91-1164

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEVADA, NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,
Petitioners,

v.

SCOTSMAN MANUFACTURING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Nevada Supreme Court erroneously apply the doctrine of federal governmental immunity from state taxation, as reiterated by this Court in United States v. New Mexico, 455 U.S. 720 (1982), in concluding that Scotsman Manufacturing Co.'s sale of modular buildings under its contract with Reynolds Electrical & Engineering Co., Inc. was actually a sale directly to the federal government, and so exempt from Nevada Sales tax?

2. Did the Nevada Department of Taxation constitutionally assess sales tax against Scotsman Manufacturing Co. on its sale of 17 modular buildings to Reynold's Electrical & Engineering Company?

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PETITION FOR A WRIT OF

CERTIORARI TO

THE NEVADA SUPREME COURT

Petitioners the State of Nevada, the Nevada Department of Taxation and Nevada Tax Commission respectfully petition that a writ of certiorari issue to review the opinion and judgment of the Nevada Supreme Court entered in this action on March 28, 1991.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 107 Nev. ___, 808 P.2d 517 (1991) and is reprinted in the Appendix as Appendix A, pp. A1 to A17. The decision of the state district court is not reported, but is reprinted as Appendix B, pp. A18 to A23.

JURISDICTION

The opinion of the Nevada Supreme Court was entered on March 28, 1991. A

petition for rehearing was timely filed by petitioners, which was denied on August 26, 1991. See Appendix F. This petition for certiorari was filed within 90 days from August 26, 1991. This court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art. 6, cl. 2 (Appendix C); Nevada Revised Statutes (N.R.S.) 374.270, 374.330(1), and 374.345; and Nevada Administrative Code (N.A.C.) 372.190 and 372.200. These statutes and regulations are reprinted as Appendicies C and D at pp. A24 to A26.

STATEMENT OF THE CASE

Reynolds Electrical & Engineering Company, Inc. (REECO) was the general or prime contractor on a construction project to build a permanent housing complex on federal land for federal

employees working at the U.S. Department of Energy's Tonopah Test Range in Nevada. After requesting bids, in December, 1983, REECO contracted with Scotsman Manufacturing Company, Inc. (Scotsman), pursuant to a construction subcontract to build, deliver and install 17 modular buildings on the site. See Appendix E wherein the material parts of the contract are reprinted.

The general terms and conditions of the construction subcontract that REECO entered into with Scotsman stated in part:

> It is mutually agreed between the parties hereto that this Subcontract is entered into for and on behalf of the United States of America, and title to all equipment and materials furnished hereunder shall pass directly from the Subcontractor to the Government. Payment for work, equipment and materials furnished hereunder will be made directly from funds belonging to the United States.
>
> . . .

> The price or prices provided for in this subcontract include all applicable taxes and such price or prices will not be increased hereafter as a result of the failure to include therein any applicable tax or as a result of any change in the Subcontractor's tax liabilities.

See Appendix E, pp. A55, A59.

The part of the subcontract that specifically describes the rights and obligations of REECO and Scotsman states in part:

> CONSIDERATION
>
> For and in consideration for the satisfactory performance, completion and acceptance by the Contractor, of all effort required within the contract period, and in accordance with the relevant documents made a part hereof, the Contractor will pay the Subcontractor the firm fixed prices set forth below:
>
> . . .
>
> The above firm fixed prices are not subject to escalation for or on account of any cost or matter whatsoever, and shall be inclusive of all elements of profit, overhead, wages, fringe benefits, transportation, equipment, supplies, materials, insurance, licenses,

> taxes and costs of whatever kind applicable to this transaction, and shall constitute full and complete payment for all work herein specified, including cleanup. (Emphasis added).

See, Appendix E, pp. A42, A48.

The contract also provided that REECO would be responsible for supervising, and accepting or rejecting Scotsman's work (Appendix E, pp. A40-A42, A48-A49, A85-A89), and that REECO could terminate the contract at its convenience. Appendix E, p. A96-A97.

In July, 1984, the Nevada Department of Taxation learned that Scotsman was performing under the subcontract with REECO, and accordingly informed Scotsman that it must register with the Department and pay Nevada sales or use tax on tangible personal property it furnished or consumed under its contract. The Department subsequently learned that Scotsman was providing modular buildings

to REECO, and notified Scotsman that it owed sales tax measured by the gross receipts it received under the contract.[1] Scotsman challenged the Department's position before the Nevada Tax Commission, which affirmed the Department's position that Scotsman was subject to tax.

Scotsman then initiated this action

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[1] Under Nevada law, a "construction contractor" is deemed to be the consumer of all tangible personal property incorporated into an improvement to realty. See N.A.C. 372.200(1). Thus, the construction contractor must either pay sales tax to the Nevada vendor of materials its uses to fulfill its contract, or accrue and remit use tax on the purchase price on materials it acquires out of state and uses to fulfill its contract. N.A.C. 372.200(2). However, N.A.C. 372.190(1)(b)(4) excludes a manufacturer of modular buildings from the definition of "construction contractor." Therefore, Scotsman, as such a manufacturer, was required to pay sales tax measured by its gross receipts under the contract with REECO. But for this regulation, Scotsman would be a construction contractor concededly liable for Nevada use tax. See Appendix D.

by filing a complaint for declaratory relief in state district court seeking a judgment declaring that its sale of modular buildings under its contract with REECO was exempt from Nevada sales tax under the Supremacy Clause of the United States Constitution, art. 6, cl. 2.[2] In its complaint Scotsman alleged that its sale of modular buildings was in actuality a sale to the federal government, and that REECO was acting merely as an agent of the federal government respecting the purchase of the modular buildings. These allegations were denied.[3]

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[2] See N.R.S. 374.270, 374.330(1), 374.345. REECO was named as a defendant in this action.

[3] REECO also filed an answer to Scotsman's complaint denying these allegations. However, REECO did not participate in the cross motions for summary judgment, or in the subsequent appeal of the district court's decision to the Nevada Supreme Court, because Scotsman's complaint against REECO was contingent upon a judicial determination that Scotsman owed sales or use tax.

Upon consideration of the parties' cross motions for summary judgment, the district court entered summary judgment in favor of the state.[4] The district court, relying on United States v. New Mexico, 455 U.S. 720 (1982), concluded that REECO was not acting as a constituent part of the federal government for purposes of its contract with Scotsman, and that Scotsman owed sales tax on its sale of modular buildings to REECO. See Appendix B, p. A22 .

Scotsman appealed, and the Nevada Supreme Court reversed and remanded, directing the district court to enter summary judgment in favor of Scotsman. After reviewing United States v. New Mexico, 455 U.S. 720 (1982), and other

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[4] The factual record before the district court and the Nevada Supreme Court consisted almost entirely of the contract between REECO and Scotsman.

Supreme Court decisions prior to New Mexico concerning the propriety of a state imposing sales or use taxes on federal contractors, the court concluded that this Court's opinion in Kern-Limerick v. Scurlock, 347 U.S. 110 (1954) provided the appropriate analysis to be used in cases concerning a sales tax. Scotsman, Appendix A, p. A 15. The court further concluded that in New Mexico, this Court recognized two distinct analyses, a "legal incidence" analysis for sales tax cases having its genesis in Kern-Limerick, and a "constituent parts" analysis for use tax cases having its genesis in United States v. Boyd, 378 U.S. 39 (1964), and being rephrased in New Mexico. See Appendix A, p. A14. The court then concluded without discussion as a matter of law that REECO in its purchase of the modular housing from Scotsman was so closely associated with

the federal government, and so lacked an independent role in the purchase, as to make the sale a sale to the United States, even though, the court acknowledged, REECO was not otherwise incorporated into the federal government. Appendix A at A17.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. SUMMARY OF THE ARGUMENT

The state contends that the Nevada Supreme Court's opinion in this case must be reversed or vacated on the grounds that it constitutes an erroneous interpretation of this Court's view of the doctrine of federal immunity from state taxation, as set out in New Mexico, by its reliance on that opinion to create a dual set of distinct analyses depending on whether a future case is faced with the state's attempt to assess a sales tax or a use tax on a federal contractor. The state contends that the Nevada

Supreme Court's opinion is misleading, and, as the result in this case demonstrates, will inevitably lead to an expansion of federal immunity from state taxation in Nevada well beyond what is constitutionally required under this Court's pronouncements in New Mexico. Such a result is potentially devastating to the revenues of a state such as Nevada with its high percentage of federally owned land and federally operated facilities.

B. THE NEVADA SUPREME COURT HAS ERRONEOUSLY INTERPRETED UNITED STATES V. NEW MEXICO'S ANALYSIS OF THE LIMITS OF FEDERAL IMMUNITY FROM STATE TAXATION.

This Court granted the writ of certiorari in New Mexico "to consider the seemingly intractable problems posed by state taxation of federal contractors". New Mexico, 455 U.S. at 730. Justice Blackmun began his analysis by reviewing the history of the doctrine of federal

immunity from state taxation, beginning with the famous case McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819); New Mexico, 455 U.S. at 730. That case, continued Justice Blackmun, "introduced the Court to what has become a 'much litigated and often confused field,' . . . one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions." New Mexico, 455 U.S. at 730.

Upon concluding his review of prior case law, Justice Blackmun enunciated the benchmark which constitutes the limits of the doctrine of federal immunity from state taxation:

> What the Court's cases have room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as

> separate entities, at least insofar as the activity being taxed is concerned.

Id. at 735.

Justice Blackmun indicated that the foregoing principle carried out the principal purpose of the immunity doctrine to forestall the problem of "clashing sovereignty" by preventing the state from directly taxing the federal government while at the same time providing a narrow approach to government tax immunity so as to give full range to each sovereign's taxing authority. Id. at 735-36.

In its opinion, the Nevada Supreme Court failed to hew to this salient principle, or even to mention it as a starting point in its analysis of the tax immunity doctrine. Instead, the court embarked on its own review of the opinions of this Court that pertained specifically to application of the

immunity doctrine to cases involving a state's attempt to assess a sales or use tax on a federal contractor in a search for the appropriate legal analysis to apply to this sales tax case. See Scotsman, Appendix A, pp. A7 to A14. The court concluded its review with the synthesization of the dual analyses described above.

The Nevada Supreme Court's identification of two distinct analyses for sales taxes and use taxes, respectively, is both erroneous and misleading. It is erroneous because it demonstrates that court's misunderstanding and misinterpretation of New Mexico and the cases leading up to New Mexico. It is misleading because it connotes the idea that the principle of governmental tax immunity is applied differently in sales tax cases than it is in use tax cases.

The state believes that in New

Mexico this Court sought to establish the above quoted salient principle as constituting the limits of the doctrine of federal immunity from state taxation that federal contractors and the federal government enjoy. This principle applies to all state taxes, not just sales and use taxes. It seems equally apparent from New Mexico and the cases prior to it that the determination of whether a federal contractor (or the federal government) may successfully assert governmental immunity from state taxation depends on the particular facts and circumstances involved. The relevant factors to be weighed are such things as the type of tax involved, the activity being taxed, and the contractual relationship between the federal contractors, the vendor (if applicable) and the government. See e.g. New Mexico, 455 U.S. at 740 (discussion of the facts

pertaining to the use tax); Id. at 742-43, (discussion of facts pertaining to the sales tax). Once the relevant factors are established, then they can be applied to the test set forth by Justice Blackmun, to wit, under these facts, does the state tax levy fall on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. In short, New Mexico establishes that there is just one way to analyze or apply the doctrine of federal governmental immunity from state taxation, regardless of the type of state tax being assessed. It is the weight given to the factors that may or may not be present in any particular case that may differ, depending on the type of tax involved.

The Nevada Supreme Court's analytical conclusions are erroneous in another way. When closely scrutinized, what both so-called analyses purport to do is find on whom the legal incidence of the sales or use tax levy falls. Thus, these purportedly distinct analyses are simply different ways of stating the same salient principle quoted above for which New Mexico stands. However, by identifying the so called "constituent parts" analysis as distinct from the "legal incidence" analysis, the Nevada Supreme Court has introduced a vehicle that is misleading, and will inevitably lead to confusion and a departure from the clearly established limits on the scope of federal immunity from state taxation.

Indeed, such a departure is evident in this case. It is ironic that, but for the fact that a Nevada tax regulation

treats manufacturers of modular buildings as vendors of tangible personal property, the Nevada Supreme Court surely would have found Scotsman to be a construction contractor and liable to pay Nevada use tax on the cost of the materials it consumed in constructing and installing these modular buildings. The Nevada Supreme Court's dual analyses countenances a return to the wooden formalism and manipulation that New Mexico sought to avoid. See New Mexico, 455 U.S. at 737.

C. THE NEVADA SUPREME COURT'S FACTUAL ANALYSIS IS ERRONEOUS AS A MATTER OF LAW.

The Nevada Supreme Court relied heavily on the factors identified by this Court in Kern-Limerick in concluding, as a matter of law, that under the facts before it REECO was so closely associated with the federal government and so lacked an independent role in the purchase of

the modular homes from Scotsman, that the sale by Scotsman was, in effect, a sale directly to the federal government. Appendix A, p. A17. In describing the pertinent facts before it, the court noted that REECO was a prime contractor for the Department of Energy, and was responsible for soliciting bids for the design, manufacture, transportation and installation of modular housing on federal land at the Tonopah test site. Id. at A2. The court also noted that the contract between REECO and Scotsman provided that it was entered into for and on behalf of the federal government, that title to all materials furnished passed directly to the federal government, and that Scotsman would be paid with funds belonging to the federal government. Id. at A3. The court finally noted that REECO generally was not incorporated into the federal government. Id. at A17.

The court neglected to refer to the other provisions in the contract between REECO and Scotsman pointed out above in the Statement of the Case that clearly indicate that REECO is liable to pay Scotsman, that REECO would be responsible for supervising, and accepting or rejecting Scotsman's work, and that REECO could terminate the contract at REECO's convenience.

To the extent Kern-Limerick serves as a point of comparison, it is interesting to note that only one of the four factors identified by the Nevada Supreme Court as significant to the result in that case exists in this case, namely, that title to the modular buildings passed directly to the federal government. On the other hand, there are no facts to suggest that REECO was a designated federal procurement agent within a statutory procurement scheme

envisioning the use of federal purchasing agents, or that the federal government was primarily liable to Scotsman for the purchase price, or that REECO was not liable to Scotsman for the purchase price, or that specific government approval was required for this or any other purchase by REECO for this construction project, or that Scotsman was informed that the federal government was the only party with an independent interest in the purchase.[5] Thus, the facts in this case are much more analogous to those in New Mexico, than they are to those in Kern-Limerick.

It is well settled that neither the advance funding arrangement utilized by REECO nor the fact that title to the

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[5] From reading the contract, REECO also had an interest in the purchase since the modular buildings constituted only one component of the entire construction project that REECO was responsible to complete.

modular buildings passed directly to the federal government mandate a finding of tax immunity. See New Mexico, 455 U.S. at 735, citing United States v. Boyd, 378 U.S 39, 41 (1964); see also New Mexico, 455 U.S. at 743, citing Alabama v. King & Boozer, 314 U.S. 1, 13 (1941).

Based on the facts in the record before the Nevada Supreme Court, the state contends that REECO, in its role as a purchaser of the modular buildings from Scotsman, was sufficiently distinct from the federal government's Department of Energy as to make Scotsman's sale to REECO subject to Nevada sales tax. The Nevada Supreme Court's conclusion to the contrary is clearly erroneous.

CONCLUSION

Based on the foregoing, it is respectfully submitted that a writ of

certiorari should be issued to the Nevada Supreme Court.

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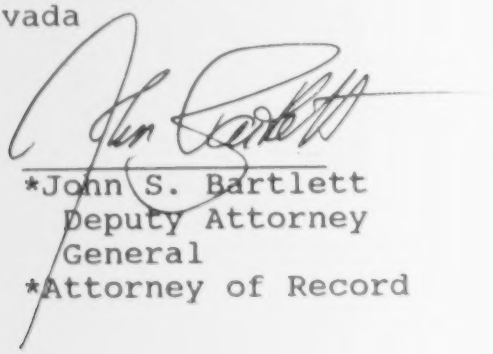
Nevada

By: 

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTSMAN MANUFACTURING COMPANY, INC., A CALIFORNIA CORPORATION, APPELLANT, v. THE STATE OF NEVADA, THE NEVADA DEPARTMENT OF TAXATION, AND THE NEVADA TAX COMMISSION, RESPONDENTS.

No.20720

March 28, 1991

Appeal from a district court order granting a cross-motion for summary judgment. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Reversed and remanded.

Guild & Hagen, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, and Kateri Cavin, Deputy Attorney General, Carson City, for Respondents.

OPINION

Per Curiam:

In this appeal, the court is asked to consider the effect of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, upon Nevada's attempt to impose a sales tax upon a modular home builder who sold homes used by the United States Department

of Energy ("Department of Energy"). Ruling upon a cross-motion for summary judgment, the district court held that the sale of modular homes was not exempt from Nevada state sales taxes as a matter of law. For the following reasons, we reverse.

THE FACTS

Scotsman Manufacturing Company, Inc. ("Scotsman") is a California corporation involved with the construction of modular homes. Reynolds Electrical and Engineering Corporation, Inc. ("REECo") is a Texas corporation and is a Department of Energy prime contractor. Under the terms of REECo's prime contract with the Department of Energy, REECo was responsible for soliciting bids for the design, manufacture, and transportation of modular housing units to be installed on federal land at the Tonopah Test Site.

In December 1983, REECo requested bids for the modular houses in a bid request that

specifically provided that any subcontract for the construction of the modular homes was:

> [E]ntered into for and on behalf of the United States of America, and title to all equipment and materials furnished ... shall pass directly from the Subcontractor to the Government. Payment for work, equipment and materials furnished ... will be made directly from funds belonging to the United States....

Scotsman submitted a bid and was awarded the subcontract to provide the modular housing units.

In July 1984, Scotsman received a letter from the State of Nevada Department of Taxation ("Department of Taxation") informing Scotsman that it was required to register with the Department of Taxation and pay either sales or use taxes for the sale of the modular homes. After further communication, the Department of Taxation wrote another letter to Scotsman on September 18, 1986. This second letter asserted the Department of Taxation's position

that Scotsman was required to pay a 3.75 percent state sales tax on the monies it received for the sale of modular homes for the Tonopah Test Site.

Scotsman appealed the Department of Taxation's decision to the Nevada Tax Commission who refused Scotsman's request for relief. The Nevada Tax Commission ordered the revenue division of the Department of Taxation to determine the total amount of sales taxes, penalties, and interest due from Scotsman. Scotsman initiated a suit for declaratory relief in the district court prior to an audit and deficiency determination by the Department of Taxation. Ruling on cross-motions for summary judgment, the district court held, as a matter of law, that Scotsman was liable to collect and pay a state sales tax for its sale of modular housing units used by the Department of Energy. This appeal followed.

SUMMARY JUDGMENT

Under NRCP 56(c), summary judgment is appropriate only where there are no genuine issues of fact to be resolved and one party is entitled to judgment as a matter of law. Leven v. Wheatherstone Condominium Corp., 106 Nev. 307, 309, 791 P.2d 450, 451 (1990). Therefore, the issue herein asks whether the district court was correct in ruling that there are no genuine issues of fact remaining in this action, and that as a matter of law, the collection of state sales taxes in this case is not proscribed by the Supremacy Clause of the United States Constitution.

THE SUPREMACY CLAUSE AND STATE TAXATION

In United States v. New Mexico, 455 U.S. 720 (1982), the United States Supreme Court was asked to decide whether federal contractors acting for the Atomic Energy Commission and its successor, the Department of Energy were subject to the State of New Mexico's sales

and use taxes. Justice Blackmun, speaking for a unanimous Court, reevaluated some of the United States Supreme Court's earlier cases and admitted that the law concerning state taxation of federal government contractors "has been marked from the beginning by inconsistent decisions and excessively delicate distinctions" Id. at 730. Justice Blackmun's characterization of "the confusing nature" of the law in this area is, in our opinion, appropriate. Id. at 733. Accordingly, we offer the following background analysis.

A. The Supremacy Clause.

"[T]he power to tax involves the power to destroy." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). Thus, under the Supremacy Clause of the United States Constitution, a state cannot impose a tax directly upon the federal government. However, it is not always easy to decide when the tax falls upon the federal government, or upon some other entity closely associated with

the United States, especially in light of the subtle distinctions drawn by the United States Supreme Court between state sales and use taxes.[1]

B. State Sales Taxes.

In Alabama v. King & Boozer, 314 U.S. 1 (1941), the United States Supreme Court upheld an Alabama sales tax imposed on materials purchased by cost-plus-fixed-fee contractors.[2]

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[1] An understanding of the distinction between a state sales tax and a state use tax is critical in this analysis. In Nevada, a state sales tax is imposed upon the retail sale of tangible personal property. See NRS 372.105. On the other hand, Nevada's use tax imposes an excise tax on the storage, use, or other consumption of tangible personal property. See NRS 372.185.

[2] Generally, under a cost-plus-fixed-fee contract, the federal government pays all of a contractor's overhead expenses and provides facilities to the contractor for the contractor's use. These facilities include such things as laboratories, offices, or factories, and are used by the contractor to provide a service or product to the federal government. In return, the federal government pays the contractor a fixed fee for the contractor's services. See. e.g., United States v. New Mexico, 455 U.S. at 722-726.

King and Boozer were to supply materials to the United States government to be purchased upon the government's credit. Thereafter, the government was to reimburse the contractors on delivery and acceptance of the materials. The Supreme Court held that under the facts of the case, King and Boozer were subject to Alabama's sales tax because, in effect, King and Boozer purchased the materials before they sold them to the government. The Court reasoned:

> [T]he contractors were to purchase in their own names and on their own credit all the materials required, unless the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.

Id. at 11. The Court concluded that the state sales tax was appropriate even though the costs of the tax would eventually be passed on to the United States.

However, in a later ruling styled Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), the Court reasserted its position that a state could not impose its sales tax directly upon the federal government. In Kern-Limerick, a contractor acted as a purchasing agent under a cost.plus-fixed-fee contract to supply tractors to the United States Navy. The state of Arkansas attempted to place a sales tax upon the sale of the tractors, asserting the sale to be to the contractor, rather than to the federal government.

The United States Supreme Court held that Arkansas could not constitutionally require the federal contractor in Kern-Limerick to pay the sales tax in question because the "legal incidence" of the tax did not fall upon the contractor. Rather, it fell directly upon the United States in violation of the Supremacy Clause because: (1) the federal government's contractor identified itself as a federal procurement agent to the tractor

retailers; (2) the title to the tractors passed directly from the vendor to the federal government, not to the contractor; (3) the purchase orders declared that the purchase was made by the federal government and that the federal government was liable on the sale; and (4) the contractor was not directly liable to the vendor for payment of the purchase price. Id. at 119-122.

C. State Use Taxes.

As previously noted, under federal government cost-plus-fixed-fee contracts, after contractors purchase materials and production equipment on behalf of the United States, the United States will sometimes turn the materials and production equipment back to the contractor for the contractor's use. The contractor will then manufacture items for the government under the contract.

For example, in United States v. Boyd, 378 U.S. 39 (1964), Union Carbide and H. K. Ferguson Company sued the state of Tennessee

to recover sales and use taxes paid as a result of a cost-plus-fixed-fee contract with the Atomic Energy Commission. The United States Supreme Court upheld the lower court's conclusion that Union Carbide and H. K. Ferguson were agents of the Atomic Energy Commission and therefore immune to state sales tax for property purchased on behalf of the United States. However, the Court further ruled that Union Carbide and H. K. Ferguson could nonetheless be taxed for their use of the same property because the use of the property was not for the sole benefit of the government, but was also for the contractor's commercial gain. As such, the contractor's use of the property was a separate taxable activity even if the economic incidence of the tax was eventually borne by the United States. Id. at 43-48.

Therefore, after Boyd, unless a contractor was an "instrumentalit[y] of the United States," the contractor did not partake of the United

State's immunity from state use taxes.[3] Id.

D. United States v. New Mexico.

The "instrumentality of the United States" analysis used in Boyd to determine the constitutionality of a state imposed use tax was rephrased in United States v. New Mexico, 455 U.S. 720 (1982), where the Supreme Court held that unless a contractor is a "constituent part" of the United States, they are not cloaked in the federal government's immunity from state use taxes. Id. at 741-742.

The constituent part analysis utilized

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[3] But see Livingston v. United States, 364 U.S. 281 (1960), where the United States Supreme Court ruled that a contractor who used federal government property to provide a service to the United States was not subject to a state use tax, even though the contractor was not incorporated into the federal government, because the contractor's total remuneration under the contract was only one dollar and the contractor otherwise had no hope of gain by using the government's facilities. Livingston indicates that unless the contractor gains or can hope to gain from using the federal property, a state may not impose a use tax.

by the Court considered whether: (1) the contractors were privately owned corporations; (2) the federal government ran the contractors' day-to-day operations; and (3) the government had an ownership interest in the contractors' operations. Id. at 739-740.

However, it must be remembered that the United States v. New Mexico "constituent part" analysis was only applied to New Mexico's use tax, and not to its sales tax. The Supreme Court indicated as much when it stated:

> In the case of sales tax... it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale-in both a real and a symbolic sense-a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure.

Id. at 742 (emphasis added). Accordingly, the United States Supreme Court applied the Kern-Limerick analysis to determine if New Mexico's sales tax was constitutionally applied

to the federal contractors in that case. Id.

In synthesizing these cases, we conclude that the United States Supreme Court requires a "constituent part" analysis to determine the constitutionality of a state imposed use tax upon a federal contractor, while the constitutionality of a state sales tax imposed upon the same contractor should he considered under the Kern-Limerick "legal incidence" analysis.

THE ANALYSIS USED BY THE DISTRICT COURT

The district court below failed to recognize the dual analytical approach utilized by the United States Supreme Court in United States v. New Mexico. The district court found that:

> Scotsman [was] clearly a "retailer of tangible personal property" and not a construction contractor subject to use tax.

(Emphasis added.) Thereafter, the district

court below concluded that "[u]nder United States v. New Mexico,... there [was] no constitutional impediment to the imposition of [a] sales tax to the transactions at issue." (Emphasis added.) Unfortunately, the district court came to this conclusion by applying the United States v. New Mexico "constituent part" analysis for a use tax. The district court reasoned:

> The contract [was] between REECo and Scotsman; the United States [was] not a party. Both REECo and Scotsman are privately owned businesses operated for profit. The government does not run either REECo's or Scotsman's day-to-day operations or even have any ownership interest in either company.

The district court erred. Since a sales tax was at issue, the district court should have applied the Kern-Limerick "legal incidence" analysis to the facts to determine if the imposition of the sales tax in this case violated the Supremacy Clause of the United

States Constitution.[4]

CONCLUSION

To reiterate the Court's analysis in United States v. New Mexico, it is possible that REECo was so closely associated with the federal government, and so lacked an independent role in the purchase of the modular

---

[4] We should note, at this juncture, NRS 374.345 which says:

The taxes imposed under this chapter apply to the sale to and the storage, use or other consumption in this state of tangible personal property by a contractor for a governmental, religious or charitable entity which is otherwise exempted from the tax, unless the contractor is a constituent part of that entity.

(Emphasis added.) Under this statute, if property is sold to a federal contractor, the contractor must be a constituent part of the United States to avoid a state sales tax. However, again, the threshold issue asks whether the sale is to the contractor or the United States. If, under a Kern-Limerick analysis, the sale is not to the federal contractor, but is to the United States in both a real and symbolic sense, a tax cannot be imposed upon the federal government under the Supremacy Clause. United States v. New Mexico, 455 U.S. at 742.

homes, as to make the sale-in both a real and a symbolic sense-a sale to the United States, even though REECo is not otherwise incorporated into the federal government. Id. at 742. Therefore, we conclude that the district court erred when it employed the "constituent part" analysis of United States v. New Mexico to determine, as a matter of law, if Nevada could constitutionally impose its sales tax upon Scotsman's sale of the modular homes installed at the Tonopah Test Site. We reverse the district court's grant of summary judgment and remand for entry of summary judgment in favor of Scotsman.

MOWBRAY, C.J.
SPRINGER, J.
ROSE, J.
STEFFEN, J.
YOUNG, J.

APPENDIX B

Case No. 89-00102A

Dept. No. 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

SCOTSMAN MANUFACTURING COMPANY, INC., a California corporation

Plaintiff,

v. ORDER

THE STATE OF NEVADA, THE NEVADA DEPARTMENT OF TAXATION, THE NEVADA TAX COMMISSION and REYNOLDS ELECTRICAL AND ENGINEERING CORPORATION, INC., a Texas corporation, Defendants.

THIS MATTER before the court on cross-motions for summary judgment. The plaintiff, Scotsman Manufacturing Company, Inc. (hereinafter Scotsman), is represented by David W. Hagen, Esq., defendant, the State of Nevada (hereinafter State), is represcnted by Kateri

Cavin, Deputy Attorney General, and defendant, Reynolds Electrical and Engineering Co.(hereinafter REECO), is represented by F. Gregory McKenna, Esq.

Scotsman and REECO entered into a contract, in 1984, whereby Scotsman was to act as a suBcontractor to REECO. REECO was a general contractor for the construction of a housing complex for federal personnel at the Tonopah Test Range. Scotsman was to provide all design, fabrication, labor, materials, plant, supervision, transportation and equipment to construct this complex.

The State subsequently informed Scotsman that they were required to register with the Nevada Department of Taxation and pay sales or use taxes. After communication between the parties concerning Scotsman's liability for sales or use taxes Scotsman posted security of $250,000.

Scotsman subsequently appealed the Department of Taxation's decision to the Nevada

Tax Commission. The Nevada Tax Commission upheld the Department of Taxation's assessment of a use tax against Scotsman.

Summary judgment is appropriate when no genuine issues of material fact remain for trial and one party is entitled to judgment as a matter of law. See Hamnton v. Brewer, 103 Nev. 73, 733 P.2d 852 (1987). All parties agree on the facts of this case and therefore summary judgment properly lies. The only question remaining is whether, based on the facts before the court, Scotsman is liable for sales or use tax on its contract with REECO as a matter of law.

Scotsman extensively briefed the distinction between use tax and sales tax. The court agrees with Scotsman that a use tax, in this case, is improper. See Nevada Tax Commission Ruling 67 (1)(c). Scotsman built modular homes, in California, to be placed on foundations at the Tonopah Test Site. In light of the above referenced Ruling

67, Scotsman is clearly a "retailer of tangible personal property" and not a construction contractor subject to a use tax.

Scotsman next argues that it is not liable to collect sales tax on the sales of the modular homes because it is a constituent part of the United Slates Government, for purposes of these sales. The court cannot agree. Scotsman in its motion for summary judgment, page 5, lines 16-20, tacitly admits that it is liable to collect sales tax; unless Scotsman is considered part of the U.S. Government for these sales. Under United States v. New Mexico, 455 U.S. 720 (1982), there is no constitutional impediment to the imposition of sales tax to the transactions at issue. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar

as the activity being taxed is concerned." Id. at 735. Scotsman has not shown that either REECO or Scotsman fits into this narrow window of immunity. The contract is between REECO and Scotsman; the United States is not a party. Both REECO and Scotsman are privately owned businesses operated for profit. The government does not run either REECO's or Scotsman's day-to-day operations or even have any ownership interest in either company.

The only remaining issue is whether the state taxes apply to these transactions. In 1983, following the Supreme Court's ruling in U.S. v. New Mexico, Id., the Nevada legislature amended the sales and use tax to reflect the New Mexico Court's decision. See Minutes, Assembly Committee on Taxation, April 15, 1984. The result was that NRS chapters 374 and 377 were changed to allow a tax to be imposed on federal contractors.

A presumption exists in Nevada that a statute, which was enacted subsequent to a

decision in a case, has been enacted to meet the situation in that case and the ruling of the court therein. Martin v. Duncan Auto Co., 53 Nev. 212, 217, 296 P. 24 (1931). The Nevada legislature clearly intended to subject federal contractors to the sales and use tax in light of New Mexico.

THEREFORE, it is the order of the court that Scotsman is liable to collect a sales tax of 3.75% on its contract with REECO. Dated this 15th day of November, 1989.

DISTRICT JUDGE

APPENDIX C

UNITED STATES CONSTITUTION

ARTICLE. VI.

Miscellaneous Provisions

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

APPENDIX D

Statutory Provisions

Nevada Revised Statutes

374.270 There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in a county of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, the state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this state.

374.330 There are exempted from the computation of the amount of the sales tax the gross receipts from the sales of any tangible personal property to:

1. The United States, its unincorporated agencies and instrumentalities.

374.345 The taxes imposed under this chapter apply to the sale to and the storage, use or other consumption in this state of tangible personal property by a contractor for a governmental, religious or charitable entity which is otherwise exempted from the tax, unless the contractor is a constituent part of that entity.

372.190 For the purposes of NAC 372.190 to 372.210, inclusive:

1. "Construction contractor" means any person who acts solely in his professional capacity or through others to construct, alter, repair, add to, remodel or otherwise improve any real property and the term:

(a) Includes a subcontractor, an interior decorator and a specialty contractor.

(b) Does not include:

(1) An employee who receives wages as his sole compensation;

(2) A licensed architect;

(3) A registered professional engineer; or

(4) A manufacturer of:

(I) Modular homes;

(II) Sectionalized housing;

(III) Prefabricated homes; or

(IV) Any other factory-built home or unit,

who joins, installs or affixes the prefabricated unit to the real property.

372.200 1. A construction contractor is the consumer of all the tangible personal property purchased for use in improving real property pursuant to a construction contract for improve-ment to real property and the tax applies to the total sales price of the property to the contractor.

2. If any such purchase is made and the sales tax is not paid because the vendor did not have a valid Nevada seller's permit, or because a resale certificate was properly given, or for any other reason, the use tax applies based upon the sales price of the property to the contractor.

APPENDIX E -

REYNOLDS ELECTRICAL & ENGINEERING CO., INC
(UNDER PRIME CONTRACT NO. DE-AC08-84NV10327 WITH THE UNITED STATES OF AMERICA ACTING THROUGH THE UNITED STATES DEPARTMENT OF ENERGY)
LAS VEGAS, NEVADA

CONSTRUCTION SUBCONTRACT FOR MODULAR BUILDINGS TONOPAH TEST RANGE, NEVADA

THIS SUBCONTRACT is entered into for the period herein specified by and between REYNOLDS ELECTRICAL & ENGINEERING CO., INC., whose address is Post Office Box 14400, Las Vegas, Nevada 89114-4400 (hereinafter called the "Contractor"), and acting as construction supervisor for the work performed under this subcontract, acting under its Prime Contract No. DE-AC08-84NV10327 with the United States of America, acting through the United States Department of Energy (hereinafter called the "Government"), and SCOTSMAN MANUFACTURING CO., INC., whose address is 2550 East 68th

Street, Long Beach, CA 90805, to act as a subcontractor to REECo in the capacity of a General Contractor (hereinafter called the "Subcontractor") to furnish the following:

I. STATEMENT OF WORK

A. The Subcontractor shall provide all design, fabrication, labor, materials, plant, supervision, transportation and equipment to construct a permanent housing complex consisting of seventeen (17) buildings, as described by the "Technical Specifications For A Permanent Housing Complex" dated September 1983 Pages 1 thru 31 and Reynolds Electrical & Engineering Co., Drawings Numbered 567 SK 23538 Sheets 1 thru 5 and Holmes & Narver, Inc. Drawing Number JS-052-6001-C2.

The complex is to be a permanent installation comprised of factory built modules erected on field constructed foundations. The end product shall have all electrical, mechanical, structural and architectural work and systems

combined into a complete operational, occupiable operating facility.

The Subcontractor shall be responsible for all excavation compaction, backfill, and excavation disposal for all foundations, wells, and crawl spaces. The foundation compaction includes any over excavation and/or fill material required to produce and maintain a 95 percent compaction.

All materials for masonry work including sand and mortar shall be furnished by the Subcontractor.

Holmes & Narver Drawing JS-052-6001-C2 shows the general, approximate arrangement of buildings to be constructed by this subcontract. Some minor realignment of those buildings may occur prior to the Subcontractor starting work at the site.

No construction power will be supplied to the Subcontractor nor is any commercial power available on the Tonopah Test Range for the Subcontractor's use.

B. All work required herein shall be performed in strict accordance with the following list of relevant documents, which are hereby incorporated into this subcontract by reference:

1. Reynolds Electrical & Engineering Co., Inc., Special Conditions No. 569T-DOC-101, dated 12/2/83 entitled "Fiscal Year 1984 Dormitories", amended as follows:

Add to Section SC-02, Paragraph No. 5: Subcontractor shall give a minimum of 24 hours notice for delivery of concrete.

Paragraph SC-07, is hereby amended to add: The Subcontractor shall be responsible for payment of all unpaid charges for the above living quarters and food not paid for by his employees.

All else remains the same.

2. Reynolds Electrical & Engineering Co., Inc., Technical Specification entitled "Permanent Housing Complex", dated September 1983, amended as follows:

GENERAL REQUIREMENTS SECTION 1.0

Delete the fourth paragraph in its entirety and substitute therefor the following: Subcontractor shall provide electrical, water, sewer, telephone and television utility stub outs for each building to a point 5 feet outside of the building lines. This utility work is to include all excavation, backfill and compaction by the Subcontractor. The Contractor will hook up all utilities. Power will be terminated to the primary side of the main distribution panel in each building by the Contractor at a later date. Water and sewer connection material shall be Schedule 40 PVC and Johns Manville Ring Tite PVC Gravity Sewer Pipe (ASTM D3034-SDR 35) or equal, respectively.

192-CUC-2

SECTION 2.0 STRUCTURAL DESIGN, Paragraph 2.1 "GENERAL DESCRIPTION" is hereby modified to add:

Exterior masonry backup material shall be

an approved exterior gypsum or fibre board sheathing with one layer of asphalt impregnated building paper on one side.

Delete in its entirety the phrase "Clear Span Steel Roof Structure".

Add in lieu thereof:

Floors, ceiling and roof structural frames in the longitudinal dimension (38' or 45') need not be clear span members. Interim column supports with appropriate foundations may be used. No more than two interim supports per span and located at corridor walls.

DOOR AND WINDOW SECTION 3.0

3.2 Doors:

Metal door louvers shall be installed on both sides at the bottom of the linen, laundry and mechanical room passage doors:

3.4 Hardware:

The standard of quality for all passage door hardware such as knobs, locksets and latches shall be schlage or equal. .Hinges, door

closures and all related door hardware shall be in accordance with Federal Specification FF-H-121, BHMA Builders Hardware Manufacturing Association (BHMA) Standards and ANSI American National Standards Institute (ANSI) Standard A-156.

3.5 Windows:

Multiple-pane glass shall be tinted bronze.

PLUMBING SECTION 7.0

7.3 hot water heating and water storage:

Each laundry room shall be provided with one water heater installed within or adjacent to the room sized according to the number of washers to be supplied.

192-CUC-3

7.5 Fixture Specifications:

The standard of quality for all plumbing fixtures such as water closets, lavatories, showers, faucets and related hardware shall be American Standard or equal.

7.5.4 Electrical Water Heater is hereby amended to add:

Water heaters shall be 277 volt, 1 PH, 60 HZ.

AIR CONDITIONING & HEATING SECTION 8.0

8.21 PACKAGED THERMAL HEAT PUMP is hereby amended to add:

Each heat pump shall be 277 volt, 1 PH, 60 HZ.

SECTION 9.0 ELECTRICAL, Paragraph 9.5 Conduit and Raceway Systems is hereby modified to add:

Flexible metallic conduit is also permitted within the interior of the building above grade.

Paragraph 9.14 ELECTRICAL LOAD CALCULATION is hereby added:

Refer to National Electrical Code, Articles 100 and 220 for procedure for calculating loads. This Permanent housing is to be considered a dormitory-type facility and not

a multi-family dwelling.

Paragraph 9.8 SERVICE EQUIPMENT - delete Subparagraph 9.8.1 entirely and substitute the following:

"Building power shall be derived from a Contractor furnished pad mounted substation external to the building fed underground at 277/480 volt, 3 PH, 4 wire".

Delete Subparagraph 9.8.2 entirely and substitute the following:

"Building service equipment shall be Subcontractor furnished, 277/480 volt with a main disconnect, bottom feed, mounted inside the mechanical room on an outside wall. Subcontractor shall provide a 5 foot underground conduit stub-out."

192-CUC-4

SPECIAL ITEMS AND MATERIALS SECTION 11.0

11.3 SIMULATED SYNTHETIC STUCCO

The simulated synthetic stucco shall be applied over an expanded polystyrene insulation board

with a woven fiberglass or metal mesh secured to the main exterior wall. Insulation board shall be UL listed or FM approved.

11.5 CABINETRY:

Each bathroom shall have a countertop with sink and no base cabinet. Countertops and backsplash shall be constructed of fire retardant wood with a plastic laminate finish. The standard of quality shall be Formica or equal with a flame spread rating no greater than 25 and a smoke development and fuel contribution no greater than 50.

All else remains the same.

3. Reynolds Electrical & Engineering Co., In. Drawing No. 567-SK-23538 Sheets 1 thru 5, and Holmes & Narver, Inc. Drawing NO. JS-052-6001-C2.

4. Terms and Conditions - Construction Subcontracts, dated 1/83, amended only as follows: Paragraph D entitled "Accommodations For Subcontractor's Personnel", and Paragraph E entitled "Telephone" of Section 10 entitled

"Site Facilities And Traffic" are hereby deleted in their entirety.

5. Riders To Terms And Conditions:

a. Rider No. 1 - Cost Or Pricing Data, dated 11/18/77.

b. Rider No. 3 - Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246) (All construction subcontracts in excess of $10,000) dated 5/82

c. Rider No. 9 - Compliance With Labor Agreements, dated 9/12/80.

Note: Applicable only to work performed on the Tonopah Test Range.

d. Rider No. 12 - Government Furnished Property dated 7/15/68.

e. Rider No. 15 - Equal Opportunity Affirmative Action Compliance Programs, dated 9/10/68.

f. Rider No. 16 - Specific Equal Employment Opportunity Responsibilities, dated 12/77.

g. Rider No. 17 - Subcontracting Program for Small Business Concerns Owned and Controlled By Socially and Economically Disadvantaged Individuals. (Applicable to Construction Subcontracts That May Exceed $1,000,000.00 And All Other Procurement That May Exceed $500,000.00 To Other Than Small Business Concerns), dated 7/79.

h. Rider No. 22 - Clean Air And Water Pollution Control Act, dated 8/6/75.

i. Rider No. 23 - Notice Of Possible Availability Of Loans For Bid And Proposal Preparation By Minority Business Enterprises Seeking DOE Contracts, dated 7/25/83.

j. Davis-Bacon Wage Decision Number NV 82-5114, 8/8/82; Mod. #1, dated 10/1/82;, Mod. #2, dated 12/3/82; Mod. #3, dated 12/27/82; Mod. #4, dated 2/4/83; Mod. #5, dated 2/25/83; Mod. #6, dated 4/29/83 and mod. #7, dated 9/23/83.

6. Work performed at Subcontractor's plant or facility will be subject to the Walsh Healy

Act. Ref. FPR 1-12.605.

II. LOCATION OF WORK

The jobsite is located at the Tonopah Test Range, which is approximately forty (40) miles southeast of Tonopah, Nevada, adjacent to Highway 6. Tonopah, Nevada is located approximately two-hundred and seven (207) miles northwest of Las Vegas, Nevada, on U.S. Highway 95.

III. PERIOD OF SUBCONTRACT

The Subcontractor shall have his personnel, plant, equipment, materials and supplies available and ready to commence work promptly after award of a subcontract and notice to proceed from Contractor, contemplated to be given on or before March 15, 1984 and all work shall be completed within 180 days from date of notice to proceed.

In the event of delay in award of a subcontract or notice to proceed by Contractor beyond March 15, 1984, a day for day slippage in the completion date shall be granted and the subcontract amended accordingly.

IV. WARRANTY OF CONSTRUCTION

A. Except as otherwise expressly provided in this subcontract, the Subcontractor shall remedy at its own expense any failure of the work (including equipment) to conform to subcontract specifications and any defect of material, workmanship or design in the work - but excluding any defect of any design furnished by the Contractor or the Government under the subcontract - provided that the Contractor gives the Subcontractor notice of any such failure or defect promptly after discovery but not later than one year after final acceptance of the work, except that in the case of defects or failures in a part of the work of which the Contractor

takes possession prior to final acceptance, such notice shall be given not later than one year from the date the Contractor takes such possession. Should the Subcontractor fail to remedy any such failure or defect within twenty-four (24) hours, or a reasonable time, after receipt of notice thereof, the Contractor shall have the right to replace, repair or otherwise remedy such failure or defect at the Subcontractor's expense. This warranty shall not delay final acceptance of or final payment for the subcontract work.

B. All lower-tier subcontractors', manufacturer', and suppliers' warranties and guarantees, expressed or implied, respecting any part of the work and any materials used therein shall be deemed obtained - and shall, at the direction of the Contractor, be enforced by the Subcontractor for the benefit of the Contractor, provided that, if directed by the Contractor, the Subcontractor shall require such lower-tier subcontractors,

manufacturers and suppliers to execute such warranties and guarantees in writing to the Contractor.

C. Any work repaired or replaced pursuant to this clause shall also be subject to the provisions of this clause to the same extent as work originally performed. The rights and remedies of the Contractor provided in this clause are in addition to and do not limit any rights afforded to the Contractor by any other clause of this subcontract.

V. CONSIDERATION

For and in consideration for the satisfactory performance, completion and acceptance by the Contractor, of all effort required within the subcontract period, and in accordance with the relevant documents made a part hereof, the Contractor will pay to the Subcontractor the firm fixed prices set forth below:

1. For buildings incorporating a total of 500 sleeping rooms using 41' 0" modules.

a. Eight (8) buildings, forty (40) sleeping rooms per building per arrangement as described by Drawings 567 SK 23538 Sheets 2 of 5 and 3 of 5.

Unit Price: $686,547.00 Per Building X 8 = $5,492,376.00.

b. Nine (9) buildings, twenty (20) sleeping rooms per building per arrangement as described by Drawings 567 5K 23538 Sheets 2 of 5 and 3 of 5.

Unit Price: $353,992.00 Per Building X 9 = $3,185,928.00.

c. The sum of the totals of Items 1.a. and 1.b.

Item 1.a. TOTAL $5,492,376.00

Item 1.b. TOTAL $3,185,928.00

1. a plus 1.b. TOTAL $8,678,304.00

A. Firm Fixed Price Of: Eight Million, Six Hundred Seventy-Eight Thousand, Three Hundred Four and No/100 Dollars.

B. The Subcontractor hereby grants the

Contractor the right to exercise any of the following options at its sole discretion. Either Option 1 or Option 2 may be exercised by the Contractor for U.S. Government fiscal year 1985 but not both. Either Option 3 or Option 4 may be exercised by the Contractor for U.S. Government fiscal year 1986 but not both. The quantity of each size of building in each of the options 1 through 4 may change, and the total number of sleeping rooms may vary from a minimum of 300 to a maximum of 500. The Subcontractor agrees to complete all work within 180 days from date of notice to proceed with the option.

OPTION NO. 1

For U.S. Government Fiscal Year 1985.
For 500 sleeping rooms based on using 41'0" (nominal) modules. The quantity of buildings of the 40 room and 20 room sizes is approximate and should the quantity change, the following unit prices for these buildings will be used.

a. Eight (8) buildings, forty (40) sleeping rooms per building per arrangement as described by Drawings 567-SK-23538, Sheets 2 of 5 and 3 of 5.

Unit Price: $755,202.00/per building.

b. Nine (9) buildings, twenty (20) sleeping rooms per building per arrangement as described by Drawings 567 SK 23538, Sheets 2 of 5 and 3 of 5.

Unit Price: $389,391.00/per building.

OPTION NO. 2

For U.S. Government Fiscal Year 1985.

For 500 sleeping rooms based on using 48'0" (nominal) modules. The quantity of buildings of the 40 room and 20 room sizes is approximate and should the quantity change, the following unit prices for these buildings will be used.

a. Eight (8) buildings, forty (40) sleeping rooms per building per arrangement as described by drawings 567-SK-23538, Sheets 2 of 5 and

4 of 5.

Unit Price: $793,289.00/per building.

b. Nine (9) buildings, twenty (20) sleeping rooms per building per arrangement as described by Drawings 567-SK-23538, Sheets 2 of 5 and 4 of 5.

Unit Price: $409,201.00/per building.

OPTION NO. 3

For U.S. Government Fiscal Year 1986.

For 500 sleeping rooms based on using 41'0" (nominal) modules. The quantity of buildings of the 40 room and 20 room sizes is approximate and should the quantity change, the following unit prices for these buildings will be used.

a. Eight (8) buildings, forty (40) sleeping rooms per building per arrangement as described by Drawings 567-SK-23538, Sheets 2 of 5 and 3 of 5.

Unit Price: $830,722.00/per building.

b. Nine (9) buildings, twenty (20) sleeping rooms per building per arrangement as described by Drawings 567 SK 23538, Sheets 2 of 5 and 3 of 5.

Unit Price: $428,330.00/per building.

OPTION NO. 4

For U.S. Government Fiscal Year 1986.

For 500 sleeping rooms based on using 48'O" (nominal) modules. The quantity of buildings of the 40 room and 20 room sizes is approximate and should the quantity change, the following unit prices for these buildings will be used.

a. Eight (8) buildings, forty (40) sleeping rooms per building per arrangement as described by Drawings 567-SK-23538, Sheets 2 of 5 and 4 of 5.

Unit Price: $872,618.00/per building.

b. Nine (9) buildings, twenty (20) sleeping rooms per building per arrangement as described by Drawings 567-SK-23538, Sheets 2 of 5 and 4 of 5.

Unit Price: $450,121.00/per building.

B. The above firm fixed prices are not subject to escalation for or on account of any cost or matter whatsoever, and shall be inclusive of all elements of profit, overhead, wages, fringe benefits, transportation, equipment, supplies, materials, insurance, licenses, taxes and costs of whatever kind applicable to this transaction, and shall constitute full and complete payment for all work herein specified, including cleanup.

VI. PAYMENT AND PERFORMANCE BONDS

A. Payment and Performance Bonds, as defined in Paragraph 19 Terms and Conditions "Construction Subcontracts" is a requirement of this subcontract. The bonds must be on Government approved forms which will be provided to the Subcontractor and shall be for the total amount of the subcontract.

B. The parties agree there is no bond between the U.S. Government and REECo, and the parties

further agree the bond between SCOTSMAN MFG. CO., INC., and REECo constitutes the Miller Act bond for this subcontract.

192-CUC-10

VII. EQUIPMENT ACCEPTANCE

All Subcontractor equipment is subject to inspection and acceptance by the Contractor. The decision of the Contractor, with respect to the capabilities of Subcontractor's equipment, shall be deemed final and conclusive.

VIII. PERSONNEL

The Subcontractor shall hire only competent personnel to be used in the performance of this subcontract. The Contractor has the right to require the replacement of any employee of the Subcontractor in the performance of this subcontract.

IX. MANDATORY COMPLIANCE WITH CONTRACTOR LABOR AGREEMENTS

It is mandatory and a condition of this subcontract that the Subcontractor strictly comply with the requirements set forth in Rider No. 9, dated September 12, 1980, entitled "Compliance With Labor Agreements" and the Terms and Conditions thereof.

X. PRIORITY

Priority rating Do-E-1 certified for national defense use under DMS Regulation 1.
The above clause shall be inserted in all purchase orders, subcontracts, or procurement documents in support of this order.

XI. AGREEMENT

It is mutually agreed between the parties hereto that this Subcontract No. 192-CUC-84 constitutes the full agreement between the parties, and is signed in several counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have executed this subcontract the day and year indicated below:

REYNOLDS ELECTRICAL & ENGINEERING CO.

By: _____

(Authorized Representative)

Date: _____

SCOTSMAN MFG. CO. INC.

By: _____

(Authorized Representative)

Date: _____

Reynolds Electrical & Engineering Co., 1Inc.

POST OFFICE BOX 14400 LAS VEGAS, NEVADA 89114#00

UNDER PRIME CONTRACT DE-AC08-76NV00410

UNITED STATES OF AMERICA ACTING THROUGH THE UNITED STATES DEPARTMENT OF ENERGY

TERMS AND CONDITIONS

CONSTRUCTION SUBCONTRACTS

1. DEFINITIONS
2. ASSIGNMENTS AND TITLE OF THE CONTRACTOR
3. STATEMENT OF WORK
4. PERMITS AND RESPONSIBILITIES
5. PAYMENT
6. SECURITY
7. SITE INVESTIGATION AND REPRESENTATIONS
8. CHANGES
9. DIFFERING SITE CONDITIONS
10. SITE FACILITIES AND TRAFFIC
11. INSPECTION AND ACCEPTANCE

12. EXAMINATION OF RECORDS

13. REPORTING OF CERTAIN COST INFORMATION

14. DISPUTES

15. TERMINATION FOR DEFAULT - DAMAGES FOR DELAY - TIME EXTENSION

16. TERMINATION FOR CONVENIENCE

17. SUSPENSION OF WORK

18. SUBCONTRACTORS

19. BONDS

20. INSURANCE REQUIREMENTS

21. LABOR PROVISIONS- GENERAL

22. LABOR

23. NOTICE OF LABOR DISPUTES

24. PATENT INDEMNITY

25. NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

26. REPORTING OF ROYALTIES

27. AUTHORIZATION AND CONSENT

28. RIGHTS IN TECHNICAL DATA

29. COVENANT AGAINST CONTINGENT FEES

30. OFFICIALS NOT TO BENEFIT

31. BUY AMERICAN ACT

32. UTILIZATION OF CONCERNS In LABOR SURPLUS AREAS

33. UTILIZATION OF SMALL BUSINESS CONCERNS AND CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS

34. PRIORITIES, ALLOCATIONS, ALLOTMENTS

35. ENTIRE AGREEMENT

36. SAVE HARMLESS

37. WAIVER OF DELIVERY SCHEDULE

38. INCORPORATION BY REFERENCE

1. DEFINITIONS - The term "Government," as used herein, means the United States of America with the United States Department of Energy (DOE) as an agency thereof.

The term "Department," as used herein, means the United States Department of Energy or any duly authorized representative thereof.

The term "Contractor," as used herein, means Reynolds Electrical & Engineering Co., Inc.

The term "Subcontractor," as used herein,

means the company, partnership, or individual who signs the subcontract and who agrees to perform the work.

2. ASSIGNMENTS AND TITLE

A. Neither this subcontract nor any interest therein nor claim thereunder shall be assigned or transferred by the Subcontractor except as expressly authorized in writing by the Contractor.

B. This subcontract is assignable to the DOE or the DOE's designee by the Contractor.

C. It is mutually agreed between the parties hereto that this Subcontract is entered into for and on behalf of the United States of America, and title to all equipment and materials furnished hereunder shall pass directly from the Subcontractor to the Government. Payment for work, equipment and materials furnished hereunder will be made directly from funds belonging to the United States. This paragraph shall not be construed to include materials, tools or equipment that

is the property of the Subcontractor and used in the performance of the work and does not become part of the finished project.

3. STATEMENT OF WORK - The Subcontractor shall proceed with the project as required by the subcontract to the end that the said project shall be accomplished in an expeditious and workmanlike manner.

4. PERMITS AND RESPONSIBILITIES

A. PERMITS - The Subcontractor shall, without additional expense to the Contractor, be responsible for obtaining any necessary licenses and permits and for complying with any applicable federal, state, and local laws and regulations in connection with the prosecution of the work.

B. LIABILITY FOR DAMAGES - The Subcontractor shall be responsible for all injury or damage to persons or property (including damage to underground property or under ground utilities which are properly indicated in the specifications and/or drawings or the existence

of which is otherwise made known to the Subcontractor) that occurs as a result of the fault or negligence of the Subcontractor, or its agents, servants or employees in connection with the prosecution of the work; shall protect, defend, indemnify and hold harmless the government and the Contractor and their officers and employees from and against all claims or suits based upon injury or damage; and shall be responsible for all materials delivered and work performed until completion and final acceptance of the work, except for any completed unit of construction thereof which theretofore may have been accepted.

C. SAFETY AND HEALTH - The Subcontractor shall take all reasonable precautions in the performance of the work under this subcontract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health regulations and requirements (including

reporting requirements) of DOE and the Contractor. The Contractor shall notify, in writing, the Subcontractor of any noncompliance with the provisions of this clause and the corrective action to be taken. After receipt of such notice, the Subcontractor shall immediately take such corrective action. The Subcontractor shall submit a management program and implementation plan to the Contractor for review and approval within 30 days after the date of award of this subcontract. In the event that the Subcontractor fails to comply with said regulations or requirements of DOE and the Contractor, the Contractor may, without prejudice to any other legal or contractual rights of DOE and the Contractor, issue an order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the Contractor. The Subcontractor shall make no claim for an extension of time or for

compensation or damages by reason of, or in connection with, such work stoppage.

D. FEDERAL, STATE, AND LOCAL TAXES - The price or prices provided for in this subcontract include all applicable taxes and such price or prices will not be increased hereafter as a result of failure to include therein any applicable tax or as a result of any change in the Subcontractor's tax liabilities.

E. INSURANCE AND TAX CONTRIBUTIONS

1. The Subcontractor shall comply with the terms and conditions of the Nevada Industrial Insurance Act, Nevada Occupational Diseases Act and the Industrial Safety Act, and shall furnish the Contractor with a Certificate of Coverage as issued by the Nevada Industrial Commission. If, for any reason, the Subcontractor does not qualify for insurance under these Acts, the Subcontractor herewith agrees to save harmless the Government and the Contractor from all liabilities resulting from any injury of an occupational nature

as described in these Acts and Rulings of the Nevada Industrial Commission.

2. The Subcontractor agrees to, and does hereby accept, full and exclusive liability for the payment of any and all contributions for taxes for Unemployment Insurance and/or Old Age Retirement Benefits, pensions or annuities, now or hereafter imposed by the Government of the United States, and/or by the government of any state or territory of the United States, which are measured by the wages, salaries or other remunerations paid to persons employed by the Subcontractor on work performed under the terms of this subcontract.

F. MATERIAL AND WORKMANSHIP

1. Unless otherwise specifically provided in this subcontract, all equipment, material and articles incorporated in the work covered by this subcontract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this subcontract, reference to any equipment,

material, article or patented process by trade name, make or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Subcontractor may, at his option, use any equipment, material, article or process which, in the Judgment of the Contractor, is equal to that named. The Subcontractor shall furnish to the Contractor for his approval the name of the manufacturer, the model number and other identifying data and information respecting the performance, capacity, nature and rating of the machinery and mechanical and other equipment which the Subcontractor contemplates incorporating in the work. When required by this subcontract or when called for by the Contractor, the Subcontractor shall furnish the Contractor for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Subcontractor's

expense with shipping charges prepaid. Machinery, equipment, material and articles installed or used without required approval shall be at the risk of subsequent rejection.

2. All work under this subcontract shall be performed in a skillful and workmanlike manner. The Contractor may, in writing, require the Subcontractor to remove from the work any employees the Contractor deems incompetent, careless, or otherwise objectionable.

G. SUPERINTENDENCE BY SUBCONTRACTOR - The Subcontractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contractor, on the work at all times during the progress thereof with authority to act for him.

5. PAYMENT

A. The Contractor will pay the subcontract price as hereinafter provided.

B. The Contractor will make progress payments monthly as the work proceeds, or at more

frequent intervals as determined by the Contractor, on estimates approved by the Contractor. If requested by the Contractor, the Subcontractor shall furnish a breakdown on the total subcontract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contractor, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Subcontractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the subcontract and (2) if the Subcontractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this subcontract.

C. In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the subcontract work. However, if the Contractor, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contractor, if he considers the amount retained to be In excess of the amount adequate for the protection of the DOE and the Contractor, at his discretion, may release to the Subcontractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work or other division of the subcontract, on which the price is stated separately in the subcontract, payments may be made therefor without retention of a percentage.

D. All material and work covered by progress

payments made shall thereupon become the sole property of the DOE, but this provision shall not be construed as relieving the Subcontractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Contractor and the DOE to require the fulfillment of all the terms of the Subcontract.

E. Upon completion and acceptance of all work, the amount due the Subcontractor under this subcontract shall be paid upon the presentation of a properly executed voucher and after the Subcontractor shall have furnished the Contractor with a release, if required, of all claims against the Contractor arising by virtue of this subcontract, other than claims in stated amounts as may be specially excepted by the Subcontractor from the operation of the release. If the Subcontractor's claim to amounts payable under the subcontract has been assigned under Article 2, Assignments

and Titles herein, a release may also be required of the assignee.

6. SECURITY

A. SUBCONTRACTOR'S DUTY TO SAFEGUARD ALL CLASSIFIED INFORMATION -The Subcontractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information, and protecting against sabotage, espionage, loss and theft, the classified documents and material in the Subcontractor's possession in connection with the performance of work under this subcontract. Except as otherwise expressly provided in this subcontract, the Subcontractor shall, upon completion or termination of this subcontract, transmit to the Contractor any classified matter in the possession of the Subcontractor or any person under the Subcontractor's control in connection with performance of this subcontract. If retention by the Subcontractor of any classified matter is required after the

completion or termination of the subcontract and such retention is approved by the Contractor, the Subcontractor will complete a certificate of possession to be furnished to the Contractor specifying the classified matter to be retained. The certification shall identify the items and types or categories of matter retained, the conditions governing the retention of the matter, and the period of retention, if known. If the retention is approved by the Contractor, the security provisions of the subcontract will continue to be applicable to the matter retained.

B. REGULATIONS - The Subcontractor agrees to conform to all security regulations and requirements of DOE.

C. DEFINITION OF CLASSIFIED INFORMATION - The term "classified information" means Restricted Data, Formerly Restricted Data, and National Security Information.

D. DEFINITION OF RESTRICTED DATA - The term "Restricted Data" means all data concerning

(1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

E. DEFINITION OF FORMERLY RESTRICTED DATA - The term "Formerly Restricted Data" means all data removed from the Restricted Data category under section 142d. of the Atomic Energy Act of 1954, as amended.

F. DEFINITION OF NATIONAL SECURITY INFORMATION - The term "National Security Information" means information or material which is owned by, produced by or, produced for or by, or under the control of the United States Government, which has been determined pursuant to Executive Order 12065 or prior Orders to require protection against unauthorized disclosure, and which is so designated.

G. SECURITY CLEARANCE OF PERSONNEL

1. The Subcontractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12065, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required.

2. Prior to being allowed entry to the Test Site, all employees of the Subcontractor, as well as those of any lower tier subcontractor, must be processed by the Contractor and receive approval by the authority authorized to grant security clearance deemed necessary by the Contractor to enable the Subcontractor to fulfill his contractual obligations. The Subcontractor shall be held responsible for seeing that his lower tier subcontractors comply with all the Contractor's security regulations.

3. The Contractor will process the

Subcontractor's employees for clearance and identification badges at no charge to the Subcontractor. However, the Subcontractor will bear the wage or salary expense, if any, incurred by its employees during such processing in and out. The Subcontractor shall be responsible for immediate return of identification badges to the Contractor or government upon completion of this project or when an employee is terminated prior to completion of this project.

H. CRIMINAL LIABILITY - It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the Subcontractor or any person under the Subcontractor's control in connection with work under this subcontract, may subject the Subcontractor, its agents, employees, or lower tier subcontractors to criminal liability under the laws of the United

States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2100 et seq.; 18 U.S.C. 793 and 794; and Executive Order 12065).

I. LOWER TIER SUBCONTRACTS AND PURCHASE ORDERS - Except as otherwise authorized in writing by the Contractor, the Subcontractor shall insert provisions similar to the foregoing in all lower tier Subcontracts and purchase orders under this subcontract.

7. SITE INVESTIGATION AND REPRESENTATIONS - The Subcontractor acknowledges that he has satisfied himself as to the nature and location of the work; the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water roads and uncertainties of weather, and similar physical conditions at the Site; the conformation and conditions of the ground; the character of equipment and facilities needed preliminary to and during the prosecution of the work; and all other matters upon which information

is reasonably obtainable and which can in any way affect the work or the cost thereof under this subcontract. The Subcontractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials to be encountered insofar as this information is reasonably ascertainable from an inspection of the Site and from exploratory work done by the Contractor as well as from information presented by the drawings and specifications made apart of this subcontract. Any failure by the Subcontractor to acquaint himself with all the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Contractor assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this subcontract, unless (1) such understanding or representations

are expressly stated in the subcontract, and (2) the subcontract expressly provides that the responsibility therefor is assumed by the Contractor.

8. CHANGES

A. The Contractor may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the subcontract including, but not limited to, changes:

1. in the specifications (including drawings and designs);

2. in the method or manner of performance of the work;

3. in the Government-furnished facilities, equipment, materials, services or site; or

4. directing acceleration in the performance of the work.

B. Any other written order or an oral order (which terms as used in this paragraph B shall include direction, instruction, interpretation

or determination) from the Contractor, which causes any such change, shall be treated as a change order under this article; provided that the Subcontractor gives the Contractor written notice stating the date, circumstances and source of the order and that the Subcontractor regards the order as a change order.

C. Except as herein provided, no order, statement or conduct of the Contractor shall be treated as a change under this article or entitle the Subcontractor to an equitable adjustment hereunder.

D. If any change under this article causes an increase or decrease In the Subcontractor's cost of, or the time required for, the performance of any part of the work under this subcontract, whether or not changed by any order, an equitable adjustment shall be made and the subcontract modified in writing accordingly; provided, however, that except for claims based on defective specifications,

no claim for any change under B above shall be allowed for any costs incurred more then 20 days before the Subcontractor gives written notice as therein required; and provided further that in the case of defective specifications for which the Government as Contractor is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Subcontractor in attempting to comply with such defective specifications.

E. If the Subcontractor intends to assert a claim for an equitable adjustment under this article, he must, within 30 days after receipt of a written change order under A above or the furnishing of a written notice under B above, submit to the Contractor a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Contractor or Government. The statement of claim hereunder may be included in the notice under B above.

F. No claim by the Subcontractor for an

equitable adjustment hereunder shall be allowed If asserted after final payment under this subcontract.

9. DIFFERING SITE CONDITIONS

A. The Subcontractor shall promptly, and before such conditions are disturbed, notify the Contractor in writing of (1) subsurface or latent physical conditions at the site differing materially from those indicated in this subcontract, or (2) unknown physical conditions at the site of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this subcontract.

The Contractor shall promptly investigate the conditions and, if he finds that such conditions do materially so differ and cause an increase or decrease in the Subcontractor's cost of, or the time required, for, performance of any part of the work under this subcontract, whether or not changed as a result of such

conditions, an equitable adjustment shall be made and the subcontract modified in writing accordingly.

B. No claim of the Subcontractor under this article shall be allowed unless the Subcontractor has given the notice required in A above; provided, however, the time prescribed therefor may be extended by the Contractor or the Government.

C. No claim by the Subcontractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this subcontract.

10. SITE FACILITIES AND TRAFFIC

A. STORAGE AND WORKING FACILITIES

1. If required by the scope of work, the Contractor will furnish unprotected open storage area at the site for Subcontractors material and equipment at a location designated by the Contractor. It shall be the Subcontractor's responsibility to provided against loss or damage of Subcontractor's property which may

result from any cause, including, but not limited to, theft, pilferage, fire and the elements. The Subcontractor shall provide suitable protection for any materials or equipment furnished to Subcontractor by the Contractor or the Government for fulfillment of its obligations hereunder.

2. Only materials, appliances, equipment, parts and supplies to be used in the fulfillment of the Subcontractor's obligation hereunder may be stored in storage areas or in warehouses and shop facilities (whether erected by the Subcontractor or not) located on Government-controlled land. If the Subcontractor abandons the performance of the work or if the Subcontractor's right to proceed is terminated pursuant to the article of the General Provisions entitled "Termination for Default - Damages for Delay - Time Extensions," the Subcontractor shall hold and save the contractor and its officers and agents free and harmless from any liability of any nature or kind arising

from the Contractor's entry into such stockpile areas, warehouses or shop facilities, and from the Contractor taking possession of and utilizing such materials, appliances and plants in completing the project.

3. All operations of the Subcontractor, including storage of materials and equipment, upon Government premises, shall be confined to those areas authorized or approved by the Contractor. No unwarranted or unauthorized entry upon or passage through or storage or disposal of materials shall be made upon Government premises.

4. The Subcontractor shall be liable for any and all damage caused by him to such Government premises. The Subcontractor shall hold and save the Contractor and the Government, and their officers and agents free and harmless from liability of any nature or kind arising from any use, trespass or damage occasioned by his operations on premises of third persons.

5. Water and 110-volt power for lights and

small tools may be available to the Subcontractor in the vicinity of the storage area, and the Subcontractor shall determine the availability of such utilities. The Subcontractor may, with written permission from the Contractor, use such facilities as are available; however, all costs of whatever kind in connection with the use of these facilities shall be borne by the Subcontractor, including connections made to existing facilities, which shall be made in the presence of the Contractor or its representative(s), the furnishing and maintenance of meters and other costs in connection therewith. The Contractor assumes no responsibility for the availability, timeliness or continuity of service for any supply. All temporary lines, pipe, valves, meters, etc., used by the Subcontractor in obtaining these utilities shall be removed by the Subcontractor at his own expense upon completion of the work.

6. Unless otherwise provided for in the

subcontract, warehouse, shop and office facilities will be provided by the Subcontractor at his own expense. The Subcontractor may, in locations on the Site to be designated by the Contractor, erect structures, install utilities and establish storage facility areas as may be necessary to perform hereunder. All of the above structures and facilities shall remain the property of the Subcontractor and, unless otherwise authorized by the Contractor, shall be removed from the Site at the Subcontractor's expense upon completion of the project, or when directed by the Contractor. After such removal, the sites thereof shall be cleaned up to the satisfaction of the Contractor.

B. USE OF ROADWAYS AND SAFETY REGULATIONS

1. The Subcontractor shall, subject to conditions proscribed by the Contractor and all traffic regulations as established by the Contractor and the DOE, use only those roadways or construct and use such temporary

roadways as may be authorized. Where materials are transported on the Site in the performance of the project, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicles or prescribed by any federal, state, or local law or regulation. When it is necessary to cross curbings and sidewalks, operate heavily loaded vehicles over developed areas or operate track type vehicles on surfaced streets, sidewalks or developed areas, Protection against damage shall be provided by the Subcontractor and any damage to roads, curbing, sidewalks or developed areas shall be repaired by or at the expense of the Subcontractor.

2. It shall be the responsibility of the Subcontractor to familiarize himself and his on-site personnel with traffic and safety requirements in existence at the Nevada Test Site. Such requirements and rulings are available from the Safety Department of the Contractor in Mercury, Nevada.

C. CLEAN UP - The Subcontractor shall, at all times, keep its assigned storage and work sites free from accumulations of waste materials, trash or rubbish, and prior to completion of the project, remove any such accumulation from and about the premises, and all tools, scaffolding, equipment and materials not the property of the Contractor or the Government. Upon completion of the project, the Subcontractor shall leave the premises in a condition satisfactory to the Contractor.

D. ACCOMMODATIONS FOR SUBCONTRACTOR'S PERSONNEL

1. Messing and recreation facilities are available at Mercury and other locations at the Nevada Test Site and may be utilized by Subcontractor personnel. Payment for these services will be made by the individual employee at the time the facilities are utilized.

2. Housing at Mercury and other locations at the Nevada Test Site may, to the extent it is available, be assigned to employees

of the Subcontractor. All personnel desiring lodging should register at the designated Housing Office after complying with the Contractor's Personnel Office badge requirements. Assignment of quarters will be made upon receipt of a housing authorization properly signed by a designated representative of the Subcontractor. Lodging quarters are provided at a rate to be determined by the DOE. Payment may be made in advance or at the end of each week of occupancy by the individual. The Subcontractor shall be responsible to the DOE for payment of lodging charges incurred by his employees and employees of his lower tier subcontractors. If facilities made available to personnel of the Subcontractor or any lower tier subcontractors hereunder are required for other use by the Government, the Subcontractor will be given thirty (30) days' written notice to vacate the assigned quarters.

E. TELEPHONE - Telephone service is available

at the Test Site, but not necessarily at a specific location. Minimum local telephone services will be determined by the DOE Communications Officer and will be provided at actual cost to the Subcontractor. Long distance service shall be arranged for by the Subcontractor with the telephone company. Local telephones may be utilized for long distance service, with calls billed to an established toll credit card number.

11. INSPECTION AND ACCEPTANCE

A. Except as otherwise provided in this subcontract, inspection and test by the Contractor of material and workmanship required by this subcontract shall be made at reasonable times and at the site of the work unless the Contractor determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture or shipment of such material. To the extent specified by the Contractor at the time of determining to make

offsite inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the subcontract requirements. Such off-site inspection or test shall not relieve the Subcontractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Contractor after acceptance of the completed work under the terms of paragraph F of this article except as herein above provided.

B. The Subcontractor shall, without charge, replace any material or correct any workmanship found by the Contractor not to conform to the subcontract requirements unless, in the public interest, the Contractor consents to accept such material or workmanship with an appropriate adjustment in subcontract price. The Subcontractor shall promptly segregate and remove rejected material from the premises.

C. If the Subcontractor does not promptly

replace rejected material or correct rejected workmanship, the Contractor may (1) by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Subcontractor, or (2) terminate the Subcontractor's right to Proceed in accordance with Article 15 of these Terms and Conditions.

D. The Subcontractor shall furnish promptly, without additional charge, all facilities, labor and material reasonably needed for performing such safe and convenient inspection and test as may be required by the Contractor. All inspection and tests by the Contractor shall be performed in such manner as not unnecessarily to delay the work. Special, fullsize and performance tests shall be performed as described in this subcontract. The Subcontractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time specified by the Contractor for its inspection.

E. Should it be considered necessary or

advisable by the Contractor at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out #me, the Subcontractor shall, on request, promptly furnish all necessary facilities, labor and material. If such work is found to be defective or non-conforming in any material respect due to the fault of the Subcontractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the subcontract, an equitable adjustment shall be made in the subcontract price to compensate the Subcontractor for the additional services involved; in such examination and reconstruction, and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time.

F. Unless otherwise provided in this

subcontract, acceptance by the Contractor shall be made as promptly as practicable after completion and inspection of all work required by this subcontract. Acceptance shall be final and conclusive except as regards latent defects, fraud or such gross mistakes as may amount to fraud, or as regards the Contractor's rights under any warranty or guarantee.

12. EXAMINATION OF RECORDS

A. The Subcontractor agrees that the Comptroller General of the United States and DOE or any of their duly authorized representatives, shall, until the expiration of three (3) years after final payment under this subcontract unless the DOE authorizes their prior disposition, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Subcontractor involving transactions related to the subcontract or certifications thereunder.

B. Nothing in this subcontract shall be deemed to preclude an audit by the General Accounting

Office of any transaction under this subcontract.

C. Except as otherwise authorized in writing by the Contractor or DOE, the Subcontractor shall insert this article, including this paragraph C, in all its lower tier subcontracts and purchase orders under this subcontract.

13. REPORTING OF CERTAIN COST INFORMATION - The Contractor and the Government may need cost; information regarding certain items of property which may be furnished or installed under this subcontract. Accordingly, at the written request of the Contractor, the Subcontractor shall furnish to the Contractor cost information pertaining to such; items of property furnished or installed under this subcontract, as the Contractor may designate, in such form and in such detail as may be required.

14. DISPUTES CLAUSE

A. Failure of the parties to reach an agreement on a request for the payment of money,

adjustment of contract terms or other relief shall constitute a dispute. Except as otherwise provided in this subcontract, in the event a dispute arises relating to this subcontract, the subcontractor shall submit a claim in writing to the contractor who shall furnish a written decision concerning the dispute to the subcontractor within thirty (30) days or such additional period as may be mutually agreed to. If, within thirty (30) days after the date of receipt of such decision the subcontractor does not notify the contractor in writing of its disagreement with the decision, the decision shall be final and conclusive.

B. The subcontractor shall proceed diligently with performance of this subcontract, pending final resolution of any request for relief, claim or action related to this subcontract and comply with any decision of the contractor, except where there has been a material breach of the subcontract by the contractor.

15. TERMINATION FOR DEFAULT, DAMAGES FOR DELAY, TIME EXTENSIONS

A. If the Subcontractor refuses or fails to prosecute the work, or any separable Part thereof, with such diligence as will insure; its completion within the time specified in this subcontract, or any extension thereof, or fails to complete said work within such time, the Contractor may, be written notice to the Subcontractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Contractor may take over the work and prosecute the same to completion by subcontract or otherwise, and may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. Whether or not the Subcontractor's right to Proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his

refusal or failure to complete the work within the specified time.

If fixed and agreed liquidated damages are provided in the subcontract and if the Government or its duly authorized representatives so terminate the Subcontractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

C. If fixed and agreed liquidated damages are provided in the subcontract and if the Government does not so terminate the Subcontractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

D. The Subcontractor's right to proceed shall not be so terminated nor the Subcontractor charged with resulting damage if:

1. The delay in the completion of the work

arises from unforeseeable causes beyond the control and without the fault or negligence of the Subcontractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor or subcontractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Subcontractor and such subcontractors or suppliers; and

2. The Subcontractor, within 10 days from the beginning of any such delay (unless the Contractor grants a further period of time before the date of final payment under the subcontract), notifies the Contractor in writing of the causes of delay.

E. The Contractor shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties subject only to appeal as provided in Article 14 of these Terms and Conditions.

F. If, after notice of termination of the Subcontractor's right to proceed under the provisions of this article, It is determined for any reason that the Subcontractor was not in default under the provisions of this article, or that the delay was excusable under the provisions of this article, the rights and obligations of the parties shall, if the subcontract contains an article providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such article. If in the foregoing circumstances, this subcontract does not contain an article

providing for termination for convenience of the Government, the subcontract shall be equitably adjusted to compensate for such termination and the subcontract modified accordingly. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the article of this subcontract entitled "Disputes."

G. The rights and remedies of the Government provided in of this article are in addition to any other rights and remedies provided by law or under this subcontract.

16. TERMINATION FOR CONVENIENCE OF THE CONTRACTOR. The Contractor reserves the right to terminate this subcontract in whole or in part for its convenience. If the subcontract is so terminated, an equitable downward adjustment in the subcontract price, resulting in a revised price that compensates the Subcontractor fairly under all the circumstances for work performed under this subcontract, shall be established by agreement of the

parties. Failure to agree on such equitable adjustment and revised price under this article shall be deemed to be a dispute within the meaning of the article of this subcontract entitled "Disputes." The Subcontractor shall make similar provisions covering termination for convenience with respect to all lower tier subcontracts and orders for suppiles and materials.

17. SUSPENSION OF WORK

A. The Contractor may order the Subcontractor, in writing, to suspend, delay or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Contractor or Government.

B. If the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed or Interrupted by an act of the Contractor In the administration of this subcontract, or by his failure to act within the time specified in this

subcontract (or if no time is specified, within a reasonable time), an adjustment shall be made for an increase in the cost of performance of this subcontract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the subcontract modified in writing accordingly. However, no adjustment shall be made under this article for any suspension, delay or Interruption to the extent (1) that performance would have been so suspended, delayed or Interrupted by any other cause, Including the fault or negligence of the Subcontractor, or f# for which an equitable adjustment is provided for or excluded under any other provisions of this subcontract.

C. No claim under this article shaLl be allowed (1) for any costs incurred more than 20 days before the Subcontractor shall have notified the Contractor in writing of the act or failure to act involved this requirement shall not apply as to a claim resulting from a suspension

order), and (2) unless the claim, in an amount stated, is asserted In writing as soon as practicable after the termination of such suspension, delay or interruption, but not later than the date of final payment under the subcontract.

18. SUBCONTRACTORS

A. The Subcontractor will submit, in writing, within five (5) days after receipt of the Notice to Proceed, the names of all lower tier subcontractors It proposes to use in performance of this work together with a summary of the extent and character of the work to be done by each lower tier subcontractor. The Subcontractor shall at any time during the performance of the work under this subcontract, upon the request of the Contractor, furnish the Contractor with a copy or copies of any or all subcontracts for performance of the work under this subcontract. If, for sufficient reasons, at any time during the progress of the work, the Contractor determines

that any other tier subcontractor is Incompetent or undesirable, he will notify the Subcontractor accordingly and immediate steps will be taken for cancellation of such subcontract. Unless otherwise authorized by the Contractor in writing, the Subcontractor shall cause provisions similar to the foregoing to be inserted in all lower tier subcontracts and purchase orders entered Into under this subcontract. Nothing contained in this subcontract shall create any contractual relationship between any of the Subcontractor's subcontractors and the Contractor.

B. The Contractor may undertake or award other subcontracts for additional work and the Subcontractor shall fully cooperate with such other subcontractors and Contractor employees and carefully fit his own work to such additional work as may be directed by the Contractor. The Subcontractor shall not commit or permit any act which will interfere with the performance of work by any other

subcontractor or by Contractor employees.

BONDS

A. PAYMENT BOND. If the subcontract exceeds $25,000, the Subcontractor agrees to furnish a payment bond with good and sufficient surety or sureties acceptable to the Contractor for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement. The penal sum of such payment bond will be 100 percent of the subcontract price unless otherwise specified led in the subcontract.

B. PERFORMANCE BOND. If the subcontract price exceeds 525,000, the Subcontractor further agrees to furnish a performance bond with good and sufficient surety and sureties acceptable to the Contractor in connection with the performance of the work under this agreement. The penal sum of such performance bond will be 100 percent of the subcontract price unless otherwise specified in the subcontract.

C. DATE OF BOND. Any bond required hereunder will be dated as of the same date as the subcontract and will be furnished by the Subcontractor to the Contractor at the time the subcontract Is signed.

D. ADDITIONAL BOND. If any surety upon any bond furnished in connection with this subcontract becomes unacceptable to the Contractor, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Contractor, the Subcontractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Contractor and of persons supplying labor or materials in the prosecution of the work contemplated by this subcontract.

INSURANCE REQUIREMENTS

A. The Subcontractor shall provide all insurance necessary to fully protect the Contractor and the Government from all claims arising

out of the performance of this subcontract, and/or lower tier subcontracts, and/or arising from the acts of their employees, business invitees or licensees, and will be required to furnish evidence of such insurance before commencing operations hereunder. The limits of the insurer's liability listed below are minimum requirements of insurance to be carried by the Subcontractor; however, such limits will not be deemed to limit the Subcontractor's liability to the Contractor.

B. The required amount of insurance to be carried by the Subcontractor under this section may be changed upon the Contractor's written notice to the Subcontractor.

1. Workmen's Compensation in accordance with the law of the state of Nevada, or the state in which the work is being performed.

2. Public Liability, other than auto:

Bodily injury One Person $100,000

One Occurrence $300,000

Property Damage One Accident $100,000

Aggregate $100,000

3. Auto Public Liability:

Bodily injury One Person $100,000

One Occurrence $300,000

Property Damage One Occurrence $100,000

LABOR PROVISION GENERAL. For all work to be performed at the job site, including deliveries to the Site of supplies, materials and equipment, the Subcontractor shall comply strictly with all the terms and conditions except those contrary to any applicable state or federal law contained in the applicable collective bargaining agreements of unions, who by said collective bargaining agreements with the Contractor have jurisdiction over the work during the entire course thereof. The Subcontractor shall pay no less than the amount required to be paid for various classifications of labor by said collective bargaining agreements. All jurisdictional disputes arising during the course of the work between unions shall be settled in

accordance with the procedural rules and regulations found in the respective labor agreements. The Subcontractor shall insert this article in each of its lower tier subcontracts.

22. LABOR

A. DAVIS-BACON ACT (40 U.S.C.27Ga.27Ga.7).

1. All mechanics and laborers, including apprentices and trainees, employed or working directly upon the site of the work shall be paid unconditionally and not less often than once a week, and without subsequent deduction or rebates on any account (except such payroll deductions as are permitted by the Copeland Regulations (29 CFR Part 3)), the full amounts due at the time of payment computed at wage rates not less than the aggregate of the basic hourly rates and the rates of payment, contributions or costs for any fringe benefits contained in the wage determination decision of the Secretary of Labor, which is attached hereto and made a part hereof, regardless

of any contractual relationship which may be alleged to exist between the Subcontractor or lower tier subcontractor and such laborers and mechanics. A copy of such wage determination decision shall be kept posted by the Subcontractor at the site of the work in a prominent place where it can be easily seen by the workers.

2. The Subcontractor may discharge his obligation under this clause to workers in any classification for which the wage determination decision contains:

a. Only a basic hourly rate of pay by making payment at not less than such basic hourly rate, except as otherwise provided in the Copeland

Regulations (29 CFR Part 3); or

b. Both a basic hourly rate of pay and fringe benefit payments by making payment in cash, by Irrevocably making contributions pursuant to a fund, plan or program for and or by assuming an enforceable commitment to bar

the cost of bona fide fringe benefits contemplated by the Davis-Bacon Act or any combination thereof. Contributions made, or costs assumed, on other than a weekly basis shall be considered as having bin constructively made or assumed during a weekly period to the extent they apply to such period. Where a fringe benefit is expressed in a wage determination in any manner other than as an hourly rate and the Subcontractor pays a cash equivalent or provides an alternative fringe benefit, he shall furnish information with his payrolls showing how he determined the cost incurred to make the cash payment or to provide the alternative fringe benefit is equal to the cost of the wage determination fringe benefit. In any case where the Subcontractor provides a fringe benefit different from any contained in the wage determination, he shall similarly show how he arrived at the hourly rate shown therefor. In the event of disagreement between or among

the interested parties as to an equivalent of any fringe benefit, the Contractor shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

3. The assumption of an enforceable commitment to bear the cost of fringe benefits, or the provision of any fringe benefits not expressly listed in Section 1(b. (2) of the Davis-Bacon Act or in the wage determination decision forming a part of the subcontract, may be considered as payment of wages only with the approval of the Secretary of Labor pursuant to a written request by the Subcontractor through the Contractor. The Secretary of Labor may require the Subcontractor to set aside assets, in a separate account, to meet his obligations under any unfunded plan or program.

4. The Contractor shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage

determination decision and which Is to be employed under the subcontract shall be classified or reclassified conformably to the wage determination decision, and shall report the action taken to the Secretary of Labor. If the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the Contractor shall submit the question, together with his recommendation, to the Secretary of Labor for final determination. Apprentices and trainees may be added under this clause only where they are employed pursuant to an apprenticeship or trainee program meeting the requirements of the Apprentices and Trainees clause below.

5. In the event it is found by the Contractor that any laborer or mechanic, including apprentices and trainees, employed by the Subcontractor or any lower tier subcontractor directly on the site of the work covered by this subcontract has been or is being pard

at a rate of wages less than the rate of wages required by paragraph (1) of this clause, the Contractor may (i) by written notice to the Subcontractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages, and (i) prosecute the work to completion by contract or otherwise; whereupon such Subcontractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

6. Paragraphs (1) through (5) of this clause shall apply to this subcontract to the extent it is a prime contract with the Government subject to the Davis-Bacon Act, or (i) a subcontract also subject to the Davis-Bacon Act under such prime contract.

B. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT. OVERTIME COMPENSATION (40 U.S.C.327-333).

1. The Subcontractor shall not require or permit any laborer or mechanic, including apprentices, trainees, watchmen and guards,

in any workweek in which he is employed on any work under this subcontract to work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer or mechanic, including apprentices, trainees, watchmen and guards, receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked In excess of 8 hours in any calendar day or in excess of 40 hours in such work week, whichever is the greater number of overtime hours. The "basic rate of pay," as used in this clause, shall be the amount paid per hour, exclusive of the Subcontractor's contribution or cost for fringe benefits and any cash payment made in lieu of providing fringe benefits or the basic hourly rate contained in the wage determination, whichever is greater.

2. In the event of any violation of the

provisions of paragraph (1), the Subcontractor shall be liable to any affected employee for any amounts due and to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including an apprentice, trainee, watchman or guard, employed in violation of the provisions of paragraph (1) in the sum of $10 for each calendar day on which such employee was required or permitted To be employed on such work in excess of 8 hours or in excess of tile standard workweek of 40 hours without payment of the overtime wages required by paragraph (1).

C. APPRENTICES AND TRAINEES

Apprentices shall be permitted to work at such only when they are registered, individually, under a bona fide apprenticeship program registered with a state apprenticeship agency which Is recognized by the Bureau of Apprenticeship and Training, U.S. Department of Labor or, if no such recognized agency

exists in a state, under a program registered with the aforesaid Bureau of Apprenticeship and Training. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the Subcontractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate who is not a trainee, as defined in paragraph (# of this clause and who is not registered as above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The Subcontractor shall furnish to the Contractor written evidence of the registration of his program and apprentices, as well as of the appropriate ratios allowed and the wage rates required to be paid thereunder for the area of construction prior to using any apprentices in the subcontract work. The term, "apprentice" means (i) a person employed and individually

registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, or with a state apprenticeship agency recognized by tile Bureau or (il) a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state apprenticeship council (where appropriate) to be eligible for probationary employment as an apprentice.

2. Trainees shall be permitted to work as such when they are bona fide trainees employed pursuant to a program approved by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training. The term,'trainee', means a person receiving on-the-job training in a construction occupation under a program which is approved, but not necessarily sponsored, by the U.S. Department

of Labor, Manpower Administration, Bureau of Apprenticeship and Training, and which Is reviewed from time to time by the Manpower Administration to ensure the training meets adequate standards.

3. In connection with subcontracts in excess of $10,000, the Subcontractor agrees as follows:

a. The Subcontractor shall make a diligent effort to hire for performance of work under this subcontract a number of apprentices or trainees, or both, in each occupation which bears to the average number of journeymen in that occupation to be employed in the performance of the subcontract the applicable ratio as set forth in
paragraph (4) of this clause.

b. The Subcontractor shall ensure that 25 percent of such apprentices or trainees in each occupation are in their first year of training, where feasible. Feasibility here Involves a consideration of (i) the availability of training opportunities for first.year

apprentices, (ii) the hazardous nature of the work for beginning workers, and (iii) excessive unemployment of apprentices in their second and subsequent years of training.

c. The Subcontractor shall, during the performance of the Subcontract to the greatest extent possible, employ the number of apprentices or trainees necessary To meet currently the requirements of paragraphs (3)(a) and (3)(b) of this clause.

d. The Subcontractor shall maintain records of employment on this subcontract by trade of the number of apprentices and trainees, apprentices and trainees in the first year of training and journeymen, and the wages paid and hours of work of such apprentices, trainees and journeymen. In addition, the Subcontractor who claims compliance based on the criterion set forth in paragraph (3)(f)(ii) of this clause shall maintain such records of employment on all his construction work in the same labor market area, both public

and private, during the performance of this subcontract. In each of the above cases, the Subcontractor shall make such records available for inspection upon request of the Department of Labor or the Contractor.

The Subcontractor shall supply one copy of each of the written notices required in accordance with paragraph (3)(f)(ii) of this clause at the request of the Contractor. The Subcontractor also agrees to supply, at month intervals during the performance of the subcontract and after completion of subcontract performance, a statement describing steps taken toward making a diligent effort and containing a breakdown by craft of hours worked and wages paid for first year apprentices and trainees, other apprentices and trainees and journeyman. One copy of the statement will be sent to the Contracts and one copy to the Secretary of Labor.

f. The Subcontractor will be deemed to have made a "diligent effort," as required by

paragraph (3)(a) if, during the performance of this subcontract, he accomplishes at least one of the following three objectives: (i) The Subcontractor employs under this subcontract a number of apprentices and trainees by craft at least equal to the ratios established in accordance with paragraph (4) of this (ii) the Subcontractor employs on all his Construction work, both public and private, in the same labor market area an average number of apprentices and trainees by craft at least equal to the ratios established in accordance with paragraph (4) of this clause, or (iii) the Subcontractor (A) if covered by a collective bargaining agreement before commencement of any work on the project, has given written notice to all joint apprenticeship committees, the local U.S. Employment Security Office, local chapter of the Urban League, Workers Defense League or other local organizations concerned with minority employment and the Bureau of Apprenticeship and Training

Representative, U.S. Department of Labor, for the locality of the work; (B) if not covered by a collective bargaining agreement, has given written notice to all of the groups stated above, except joint apprenticeship committees, and will, in addition, notify all non-joint apprenticeship sponsors in the labor market area; (C) has employed all qualified applicants referred to him through normal channels, such as the employment service, joint apprenticeship committees and, where applicable, minority organizations and apprenticeship outreach programs who have been delegated this function, at least up to the number of such apprentices and trainees required by paragraph (4) of this clause (D) notice, as referred to herein, will include at least the Subcontractor's name and address, agency designation, subcontract number, job site address, value of contract, expecting starting and completion dates, estimated average number of employees in each occupation to

be employed over the duration of the subcontract work, and a statement of his willingness to employ a number of apprentices and trainees at least equal to the ratios established in accordance with paragraph (4) of this clause.

4. The Secretary of Labor has determined that the applicable ratios of apprentices and trainees to journeymen in any occupation for the purpose of this clause shall be as follows: (i) in any occupation, the applicable ratio of apprentices and trainees to journeymen shall be equal to the predominant ratio for the occupation in the area where the construction is being undertaken, set forth in collective bargaining agreements or other employment agreements, and available through the Bureau of Apprenticeship and Training Representative, U.S. Department of Labor, for the applicable area; (ii) for any occupation for which no ratio is found, the ratio of apprentices and trainees to journeymen shall be determined by the Subcontractor in accordance

with the recommendations set forth in the Standards of the National Joint Apprentice Committee for the occupation, which are on file at offices of the U.S. Department of Labor's Bureau of Apprenticeship and Training; and (iii) for any occupation for which no such recommendations are found, the ratio of apprentices and trainees to journeymen shall be at least one apprentice or trainee for every five journeymen.

D. PAYROLLS AND BASIC RECORDS

1. The Subcontractor shall maintain payrolls and basic records relating thereto during the course of the work and shall preserve them for a period of three years thereafter for all laborers and mechanics, including apprentices, trainees, watchmen and guards, working at the site of work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay (including rates of contributions for, or costs assumed to provide, fringe

benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Subcontractor has obtained approval from the Secretary of Labor as provided in paragraph (3) of the clause entitled "Davis-Bacon Act," he shall maintain records which show the commitment, its approval, written communication of the plan or program to the laborers or mechanics affected, and the costs anticipated or incurred under the pian or program.

2. The Subcontractor shall submit weekly a copy of all payrolls to the Contractor. The Subcontractor shall be responsible for the submission of copies of payrolls of all lower tier subcontractors. The copy shall be accompanied by a statement signed by the Subcontractor indicating the payrolls are correct and complete, the wage rates contained therein are not less than those determined by the Secretary of Labor, and the classifications set forth for each laborer

or mechanic, including apprentices and trainees, conform with the work he performed. Submission of the "Weekly Statement of Compliance" required under this subcontract and the Copeland Regulations of the Secretary of Labor (29 CFR Part 3) shall satisfy the requirement for submission of the above statement. The Subcontractor shall also submit a copy of any approval by the Secretary of Labor with respect to fringe benefits required by paragraph (3) of the clause entitled "Davis-Bacon Act."

3. The Subcontractor shall make the records required under this clause available for inspection by authorized representatives of the Contractor and the Department of Labor, and shall permit such representatives to interview employees during working hours on the job.

COMPLIANCE WITH COPELAND REGULATIONS. The Subcontractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR Part 3) which are incorporated herein

by reference.

F. WITHHOLDING OF FUNDS

1. The Contractor may withhold or cause to be withheld from the Subcontractor so much of the accrued payments or advances as may be considered necessary (i) to pay laborers and mechanics, including apprentices, trainees, watchmen and guards, employed by the Subcontractor or any lower tier subcontractor on the work the full amount of wages required by the subcontract, and (ii) to satisfy any liability of the Subcontractor for liquidated damages under paragraph (2) of the clause entitled "Contract Work Hours and Safety Standards Act-Overtime Compensation."

If the Subcontractor fails to pay any laborer, mechanic, apprentice, trainee, watchman or guard employed or working on the site of the work all or part of the wages required by the subcontract, the Contractor may, after written notice to the Subcontractor, take such action as may be necessary to cause

suspension of any further payments or advances until such violations have ceased.

SUBCONTRACTS. The Subcontractor agrees to Insert the clauses hereof entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act-Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds,'' "Subcontracts'' and "Contract Termination-Debarment', In all lower tier subcontracts. The term "Subcontractor'' as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

H. CONTRACT TERMINATION-DEBARMENT. A breach of the clauses hereof entitled "Davis-Bacon Act,', "Contract Work Hours and Safety Standards Act-Overtime Compensation,.'.'Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," and ''Subcontracts"

may be grounds for termination of the subcontract and for debarment as provided In 29 CFR 5.6.

I. EQUAL OPPORTUNITY - (The following clause is applicable unless this subcontract Is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR ch. 60).)

During the performance of this subcontract, the Subcontractor agrees as follows:

a. The Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall Include, but not be limited to, the following: Employment, upgrading, demotion or transfer recruitment or recruitment advertising; layoff or termination; rates

of pay or other forms of compensation; and selection for training, Including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contractor setting forth the provisions of this Equal Opportunity clause.

b. The Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

c. The Subcontractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the Contractor, advising the labor union or workers' representative of the Subcontractor's commitments under this Equal Opportunity clause, and shall post copies

of the notice In conspicuous places available to employees and applicants for employment.

d. The Subcontractor will comply with all provisions of Executive Order No.11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1987, and of the rules, regulations and relevant orders of the Secretary of Labor.

e. The Subcontractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1985, as amended by Executive Order 11375 of October 19, 1987, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

f. In the event of the Subcontractor's noncompliance with the Equal Opportunity clause of this subcontract or with any of the said

rules, regulations and orders this subcontract may be canceled, terminated or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11248 of September 24, 1985, as amended by Executive Order 11375 of October 19, 1887, and such other sanctions may be Imposed and remedies Invoked as provided in Executive Order No.11246 of September 24, 1985, as amended by Executive Order 11375 of October 19, 1967, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

g. The Subcontractor will Include the provisions of paragraphs (a) through (g) in every lower tier subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No.11246 of September 24, 1985, as amended by Executive Order 11375 of October 19, 1987, so that such

provisions will be binding upon each lower tier subcontractor or vendor. The Subcontractor will take such action with respect to any lower tier subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, Including sanctions for noncompliance; provided, however, that in the event the Subcontractor becomes Involved In, or is threatened with, litigation with a lower tier subcontractor or vendor as a result of such direction by the contracting agency, the Subcontractor may request the United States to enter into such litigation to protect the interests of the United States.

SUBCONTRACTS TERMINATION. The Subcontractor agrees to Insert Paragraph A through K hereof In all subcontracts and further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this subcontract.

K.CONVICT LABOR - In connection with the performance of work under this subcontract,

the Subcontractor agrees not to employ any person undergoing sentence of Imprisonment except as provided by Public. Law 89.176, September 10, 1965 (18 U.S.C. 408(c)(21) and Executive Order 11755, December 29, 1973.

23.NOTICE LABOR DISPUTES. Whenever an actual or potential labor dispute Is delaying or threatens to delay the performance of the work, the Subcontractor shall Immediately notify the Contractor in writing. Such notice shall Include all relevant information concerning the dispute and Its background.

PATENT INDEMNITY. If the amount of this subcontract Is in excess of $10,000, the subcontractor shall Indemnify the Contractor and the Government and their officers, agents, and employees against liability, Including costs, for Infringement of any United States letter patent (except letters patent issued upon an application which Is now or may hereafter be kept secret or otherwise withheld from Issue by order of the Government) arising

out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this subcontract, or out of the use or disposal by or for the account of the Contractor or the Government of such supplies or construction work. The foregoing Indemnity shall not apply unless the Subcontractor shall have been Informed as soon as practicable by the Contractor or the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules or regulations to participate in the defense thereof: and further, such indemnify shall not apply to: (i) an Infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance

of the subcontract not normally used by the Subcontractor (ii) an infringement resulting from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Subcontractor or (ii) a claimed Infringement which Is settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.

25. NOTICE AND ASSISTANCE REGARDING PATENT AND COPY RIGHT INFRINGEMENT. The provisions of this clause shall be applicable only if the amount of this subcontract exceeds $10,000.

A. The Subcontractor shall report to the Contractor, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this subcontract of which the Subcontractor has knowledge.

B. In the event of any claim or suit against the Government on account of any alleged patent

or copyright infringement arising out of the performance of this subcontract or out of the use of any supplies furnished or work or services performed hereunder the Subcontractor shall furnish to the Government when requested by the Contracting Officer, all evidence and Information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Subcontractor has agreed to indemnify the Government.

C. This clause shall be included in all lower tier subcontracts hereunder.

26. REPORTING OF ROYALTIES. If this subcontract is in an amount which exceeds $10,000 and If any royalty payments are directly involved in the subcontract or are reflected in the price to the Contractor, the Subcontractor agrees to report in writing to the Contractor during the performance of this subcontract and prior to Its completion or final settlement

the amount of any royalties or other payments paid or to be paid by it directly to others In connection w#h the performance of this subcontract, together with the names and addresses of licensors to whom such payments are made and.either the patent numbers Involved or such other information as will permit Identification of the patents or other basis on which the royalties are to be paid. The approval of the DOE or the Contractor of any Individual payments or royalties shall not stop the Government or the Contractor at any time from contesting the enforceability, validity, or scope of, or title to, any patent under which a royalty or payments are made.

27.AUTHORIZATION AND CONSENT The Government has given its authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture, in the performance of this subcontract or any part hereof or any amendment hereto or any lower tier subcontract hereunder of any invention described

in and covered by a patent of the United States (i) embodies In the structure of composition of any article the delivery of which is accepted by or on behalf of the Government under this subcontract or (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Subcontractor or the using rower tier subcontractor with (a) specifications or written provisions now or hereafter forming a part of this subcontract, or (b) specific written Instructions given by or on behalf of the Contracting Officer directing the manner of performance. The entire liability to the Government for Infringement of a patent of the United States shall be determined solely by the provisions of the Indemnity clauses, if any, included in this subcontract or any lower tier subcontract hereunder, and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

28.RIGHTS IN TECHNICAL DATA

A. DEFINITIONS

1. "Technical Data" means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog Item identification, and related information. Technical data as used herein

does not include financial reports, cost analyses, and other information incidental to subcontract administration.

2. "Proprietary Data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality.

(ii) Have not been made available by the owner to others without obligation concerning its confidentiality, and

(iii) Are not already available to the Contractor and Government without obligation concerning their confidentiality

3. "Subcontract Data" means technical data first produced in the performance of the subcontract, technical data which are specified

to be delivered in the subcontract, technical data that may be called for under the "Additional Technical Data Requirements" clause of the subcontract, if any, or technical data actually delivered in connection with the subcontract.

4. "Unlimited Rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. ALLOCATION OF RIGHTS

1. The Contractor and The Government shall have:

(i) Unlimited rights in subcontract data except as otherwise provided below with respect to proprietary data.

(ii) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this subcontract on any technical data furnished hereunder, If In response to a written inquiry by The Contractor or DOE

concerning the propriety of the markings, the Subcontractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case the Contractor or DOE will notify the Subcontractor of the action taken.

(iii) No rights under this subcontract In any technical data which are not subcontract data.

2. The Subcontractor shall have:

(i) The right to withhold proprietary data In accordance with the provisions of this clause.

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this subcontract, contract data it first produces in the performance of this subcontract provided the data requirements of this subcontract have been met as of the date of the private use of such data. The Subcontractor agrees that to the extent it receives or is given access to proprietary data or other

technical, business or financial data in the form of recorded information from the Contractor or DOE or a DOE Contractor or Subcontractor, the Subcontractor shall treat such data in accordance with any restrictive legend contained thereon, unless use Is specifically authorized by prior written approval of the Contractor or Contracting Officer.

3. Nothing contained in this "Rights In Technical Data" clause shall Imply a license to the Contractor or Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Contractor or Government under any patent.

C. COPYRIGHTED MATERIALS

1. The Subcontractor shall not, without prior written authorization of the Contractor or Contracting Officer, establish a claim to statutory copyright in any subcontract data first produced in the performance of the subcontract. To the extent such authorization

is granted, the Government reserves for itself and others acting on its behalf a royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit and perform any such data copyrighted by the Subcontractor.

2. The Subcontractor agrees not to include in the technical data delivered under the subcontract any material copyrighted by the Subcontractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If such royalty-free license is unavailable and the Subcontractor nevertheless determines that such copyrighted material must by included in the technical data to be delivered, rather than merely incorporated therein by reference, the Subcontractor shall request the written

authorization of the Contractor to include such copyrighted material in the technical data without a license.

D. LOWER TIER SUBCONTRACTING

It is the responsibility of the Subcontractor to obtain from its lower tier subcontractors technical data and rights therein, on behalf of the Contractor and Government, necessary to fulfill the Subcontractor's obligations to the Contractor and Government with respect to such data. In the event of refusal by a lower tier subcontractor to accept a clause affording the Contractor and Government such rights, the Subcontractor shall:

1. Promptly submit written notice to the Contractor and Government Contracting Officer setting forth reasons for the lower tier subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

2. Not proceed with the lower tier subcontract without the written authorization of the

Contractor and Contracting Officer.

E. WITHHOLDING OF PROPRIETARY DATA

Notwithstanding the inclusion of the "Additional Technical Data Requirements" clause, if any, in this subcontract or any provision of this subcontract specifying the delivery of technical data, the Subcontractor may withhold proprietary data from delivery, provided that the Subcontractor furnishes in lieu of any such proprietary data, so withheld technical data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics and performance requirement (''Form, Fit and Function" data e.g. specification control drawings catalog sheets, envelope drawings etc.) or a general description of such proprietary data where "Form, Fit and Function'' data are not applicable. The Contractor or Government shall acquire no rights to any proprietary data so withheld except that such data shall be subject to the "Inspection Rights" provisions

of paragraph (f) and, if included, the "Limited Rights in Proprietary Data'' provisions of paragraph (g) and the "Subcontractor Licensing" provisions of paragraph (h).

F. INSPECTION RIGHTS

Except as may be otherwise specified in this subcontract for specified items of proprietary data which are not subject to this paragraph, the Government Contracting Officer's representatives, at all reasonable times up to three (3) years after final payment under this subcontract, may inspect at the Subcontractor's facility any proprietary data withheld under paragraph (e) and not furnished under paragraph (g) For the purposes of verifying that such data properly fell within the withholding provision of paragraph (e), or for evaluating work performance.

29. COVENANT AGAINST CONTINGENT FEES. The Subcontractor warrants that no person or selling agency has been employed or retained to solicit or secure this subcontract upon agreement

or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Subcontractor for the purpose of securing business. For breach or violation of this warranty, the Contractor shall have the right to ennul this subcontract without liability or, at its discretion, to deduct from the subcontract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

30. OFFICIALS NOT TO BENEFIT. No member of Congress, or delegate to, or resident Commissioner shall be admitted to any share or part of this subcontract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this subcontract if made with a corporation for its general benefit.

31. BUY AMERICAN ACT

A. In accordance with the Buy American Act

(41 U.S.C. 10a-d) and Executive Order 10582, December 17, 1954, (3 CFR, 1954-58 Comp., p. 230), as amended by Executive Order 11051, September 27, 1962 (9 CFR,1959-63 Comp., p.635), the Subcontractor agrees that only domestic construction material will be used (by the Subcontractor, materialmen, and suppliers) in the performance of this subcontract except for nondomestic material listed In the subcontract.

B. DOMESTIC CONSTRUCTION MATERIAL- "Construction material" means any article, material, or supply brought to the construction site for incorporation In the building or work. An unmanufactured construction material is a "domestic construction material" If it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United

States exceeds fifty per cent of the cost of all its components. "Components" means any article, material or supply directly incorporated in a construction material.

C. DOMESTIC COMPONENT. A component shall be considered to have been "mined, produced or manufactured in the United States" (regardless of its source in fact) if the article, material or supply in which it Is Incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

32. UTILIZATION OF CONCERN IN LABOR SURPLUS AREAS - It is the policy of the Government to place contracts with concerns which will perform such contracts substantially, in areas of persistent or substantial labor surplus where this can be done, consistent with the efficient performance of the subcontract,

at prices no higher than are obtainable elsewhere. The Subcontractor agrees to use his best efforts to place his subcontracts in accordance with this policy, in complying with the foregoing and with paragraph B of Article 33 of this subcontract entitled,'Utilization of Small Business Concern," the Subcontractor in placing his subcontracts shall observe the following order of preference:

1. Concerns which are located in labor surplus areas, and which are also small business concerns, on the basis of a total set-aside.

2. Concerns which are small business concerns on the basis of a total set-aside.

3. Concerns which are small business concerns, on the basis of a partial set-aside.

4. Concerns which are located in labor surplus areas, on the basis of a total set-aside.

33. UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED

INDIVIDUALS

A. It is the policy of the United States, Department of Energy and the Contractor that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by the Department and the Contractor.

B. The Subcontractor hereby agrees to carry out this policy in the awarding of lower tier subcontracts/purchase orders to the fullest extent consistent with the efficient performance of this subcontract. The Subcontractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration, the Department of Energy or the Contractor as may be necessary to determine the extent of the Subcontractor's compliance with this clause.

C. As used in this subcontract, the term "small business concern" shall mean a small business

as defined pursuant to section 3 of the Small Business Act (15 U.S.C. 632) and relevant regulations promulgated pursuant thereto including sect. 1-1.701 of the Federal Procurement Regulations. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern:

1. Which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

2. Whose management and daily business operations are controlled by one or more of such individuals.

The Subcontractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans,

Native American and other specified minorities, or any other individual found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act.

D. Subcontractors acting in good faith may rely on written representations by their lower tier subcontractors/sellers regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

34. PRIORITIES, ALLOCATIONS, ALLOTMENTS

The subcontractor shall follow the rules, regulations, and procedures of the Defense Priorities System and the Defense Materials System, Regulation 1, and all other applicable regulations and orders of the International Trade Administration, Department of Commerce, in obtaining controlled materials and other products and materials needed to perform this subcontract.

Priority Rating DO-E-1, certified for National Defense Use under DMS Regulation 1, shall apply.

The above clause shall be inserted in all purchase orders, subcontracts, or procurement documents issued in support of this subcontract.

35. ENTIRE AGREEMENT. The Subcontract of which these General Provisions area part, and all attachments, contain the entire agreement between the parties. It supersedes all previous letters of intent, letter contracts, notices of award and to proceed, purchase orders and agreements, if any (hereinafter referred to as "previous agreements") heretofore had between the parties with respect to the work, and all previous negotiations, writings and understandings, if any, in connection with the work are merged Into this subcontract. This subcontract may not be changed or modified In any manner, or released, discharged, abandoned or otherwise terminated except as expressly provided herein or by an instrument

in writing signed by a duly authorized representative of the Contractor and by a duly authorized representative of the Subcontractor.

36. SAVE HARMLESS- The Subcontractor shall save harmless the Government and the Contractor from any and all liability resulting from the Subcontractor's operations under this subcontract. If any claim is made or legal proceeding is commenced by any third person against the Government or the Contractor on account of or arising out of operation under this subcontract, the Subcontractor agrees to pay the amount claimed, or to assume the defense of such legal proceedings, pay all attorney's fees costs and expenses in connection therewith, and to satisfy any judgment that may be rendered.

37. WAIVER OF DELIVERY SCHEDULE

A. None of the following shall be regarded as an extension, waive or abandonment of the delivery schedule or a waiver of the

Contractor's right to terminate for default: (1) Delay by the Contractor in default terminating; (2) Acceptance of delinquent deliveries; and (3) Acceptance or approval of samples submitted either after a delivery default, or in insufficient time for Subcontractor to meet a delivery schedule.

B. Any Contractor assistance to Subcontractor, or acceptance of delinquent goods or services will be solely for the purpose of minimizing damages and is not to be interpreted as a Contractor intention to condone any delinquency, or a waiver of any rights the Contractor or the DOE may have under this Subcontract.

18. INCORPORATION BY REFERENCE. The following clauses of the Federal Procurement Regulations (FPR), published in 41 Code of Federal Regulations, are hereby incorporated by reference:

FPR Temporary Regulation 39

(FR August 9, 1978)

Affirmative Action. Disabled Veterans

and Veterans of the Vietnam Era

FPR Temporary Regulation 38

(FR April 18, 1978)

Employment of the Handicapped

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTSMAN MANUFACTURING COMPANY, INC., a California corporation, Appellant, vs. THE STATE OF NEVADA, THE NEVADA DEPARTMENT OF TAXATION, and THE NEVADA TAX COMMISSION, Respondents.	No. 20720

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Mowbray

_____, J.
Springer

_____, J.
Rose

_____, J.
Steffen

_____, J.
Young

cc: Hon. Michael R. Griffin, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Guild & Haggen
Kiyoshi Nishikawa, Clerk

(3)

Supreme Court, U.S.
FILED
DEC 11 1991
OFFICE OF THE CLERK

91-1164

No. _____

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEVADA, NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,

Petitioners,

v.

SCOTSMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The Nevada Supreme Court

BRIEF IN OPPOSITION

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SUPREME COURT, U.S.

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INTRODUCTION AND STATEMENT OF THE CASE

The ruling complained of, *Scotsman Manufacturing Company v. The State of Nevada, et al.*, 107 Nev. Adv. Op. 22, 808 P.2d 517 (1991), decides a federal question in a way that is consistent with the applicable decisions of this Court. See Sup. Ct. R. 10.1(c). The question presented there was:

> Did the [trial court] err in its determination that tangible personal property [housing modules] purchased by a federal contractor and paid for by the United States in which title vested immediately pursuant to the contract was not exempt from the Nevada Sales Tax Act?

Scotsman's Opening Brief at 5, App. 1.

The Nevada Supreme Court decided that the sale was exempt from the tax because of the Supremacy Clause of the United States Constitution (art. VI, cl. 2) and the rule in *Kern-Limerick, Inc. v. Scurlock*, 342 U.S. 110 (1954), construed in *United States v. New Mexico*, 455 U.S. 720, 741-742 (1982). *Scotsman v. Nevada*, 808 P.2d at 519, 521. The case was remanded to the trial court for entry of summary judgment in respondent's favor. *Id.* at 521.

SUMMARY OF ARGUMENT

1. Petitioners taxed the sale of housing modules built in California by respondent, and sold and delivered by respondent in Nevada to the United States through its prime contractor, Reynolds Electrical and Engineering Corporation, Inc. By the sales contract the goods were

paid for out of United States' funds and title to them passed directly to the United States. The tax on the sale violates the Supremacy Clause of the United States Constitution (art. VI, cl. 2).

2. Petitioners' suggestion that the federal contractor was sufficiently distinct from the government so as to subject the sale to the tax impermissibly invites the Court to determine a factual issue.

3. The petition is frivolous. Therefore, respondent asks for just damages under Sup. Ct. R. 42.2.

ARGUMENT

THE PETITION IS FATALLY FLAWED

Petitioners flatly deny the law. Their SUMMARY OF ARGUMENT gives as its only ground that the Nevada Supreme Court misreads *United States v. New Mexico* "to create a dual set of distinct analyses" for application, one to a use tax, the other to a sales tax. (Petition at 10.) But that is exactly what *New Mexico* does; petitioners avoid the opinion's central and plainly worded distinction between sales and use taxes:

> Unless the entity as a whole is one of the Government's "constituent parts," then, a tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the

> purchase, as to make the sale – in both the real and a symbolic sense – a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure. Such was the court's conclusion in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954). . . .

United States v. New Mexico, 455 U.S. at 741-742.

Hardly unaware of those words, but never distinguishing or acknowledging them, petitioners stubbornly insist that *New Mexico* "establishes" but one test for the imposition of either tax, sales or use, to the federal contractor's purchase of goods. (Petition at 16.) Denial of the rule of the case does not qualify as reasoned argument[1] and should be disregarded.

In sum, the petition does not meet the charge of Sup. Ct. R. 10.1(c); the federal question decision complained of is not in conflict with any applicable decision of this Court.

THIS COURT WILL NOT REVIEW A STATE COURT FACT QUESTION

The Nevada Supreme Court decided this case in the knowledge that:

---

[1] It is also not one petitioners can innocently make. *New Mexico* reaffirms *Kern-Limerick*, a case that is well known to Nevada's taxing authorities. In *United States v. Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev. 1968), aff'd, 439 F.2d 435 (9th Cir. 1971), the district court identified *Kern-Limerick* as forbidding a sales tax under virtually identical payment-title passage terms in a federal procurement contract. *Id.* at 291 F. Supp. 532.

1) at sale title passed directly to the United States, paid for from funds of the United States; and

2) the parties were deemed to have agreed before the trial court (by cross-motions for summary judgment) that there were no genuine issues of material fact. Trial Court's Judgment at 2, App. 2.

Petitioners now affect a factual issue: whether the federal contractor may have been sufficiently distinct from the federal government to make the sale taxable. The issue is past raising. But even if it were not, petitioners may not seek such review here. See 28 U.S.C. §1257. State court fact questions will not be considered by this Court. *Missouri, Kansas & Texas Ry. Co. v. Haber,* 169 U.S. 613 (1898). This Court accepts state court fact determinations as final. *Christman v. Miller,* 197 U.S. 313 (1905).

BECAUSE THE PETITION IS FRIVOLOUS, SCOTSMAN SHOULD BE AWARDED ATTORNEY FEES AND COSTS

Petitioners have not headed the warning Sup. Ct. R. 42.2 gives against frivolous petitions. Respondent's just damages caused by the petition are its attorney fees, Sup. Ct. R. 43 costs and the cost of printing and serving this opposition.

CONCLUSION

No special or important reason exists to grant the petition. See Sup. Ct. R. 10.1. It is respectfully urged that it be denied, and that respondent be awarded just damages.

Dated: December 11, 1991.

GUILD & HAGEN, LTD.
DAVID W. HAGEN
100 W. Liberty St., #800
Reno, Nevada 89505

Attorneys for Respondent

APPENDIX

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Excerpt From Scotsman's Opening Brief below at 5.....App. 1

Excerpt From the Trial Court's Judgment below at 2.....App. 1

From Scotsman's Opening Brief below at 5 (highlighting added):

QUESTION FOR REVIEW

I. **Did the district court err in its determination that tangible personal property purchased by a federal contractor and paid for by the United States in which title vested immediately pursuant to the contract was not exempt from the Nevada Sales Tax?**

STATEMENT OF THE CASE

1. NATURE OF THE CASE AND PRIOR PROCEEDINGS.

This is an action for judicial declaration that the sale by appellant Scotsman Manufacturing Company, Inc. ("Scotsman") to the United States of America through its agent, respondent Reynolds Electrical and Engineering Company, Inc. ("REECO"), of personal property paid for by the United States in which title vested immediately is exempt from the Nevada Sales Tax Act. ROA 1-8.

From The Trial Court's Judgment below at 2 (highlighting added):

Summary Judgment is appropriate when no genuine issues of material fact remain for trial and one party is entitled to judgment as a matter of law. See *Hampton v. Brewer*, 103 Nev. 73, 733 P.2d 852 (1987). All parties agree on the facts of this case and therefore summary judgment properly lies.

Scotsman extensively briefed the distinction between use tax and sales tax. The court agrees with Scotsman that

a use tax, in this case, is improper. See Nevada Tax Commission Ruling 67(1)(c). Scotsman built modular homes in California, to be placed on foundations at the Tonopah Test Site. In light of the above-referenced Ruling 67, Scotsman is clearly a "retailer of tangible personal property" not a construction contractor. . . .

* * *

91-1164

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEVADA, NEVADA DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,
Petitioners,

v.

SCOTSMAN MANUFACTURING COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

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ARGUMENT

A. THE OPINION OF THE NEVADA SUPREME COURT CLEARLY CONFLICTS WITH THE OPINION OF THIS COURT IN UNITED STATES V. NEW MEXICO ON AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

In its brief in opposition to the petition for writ of certiorari, respondent Scotsman Manufacturing Company (Scotsman) asserts that the petition "does not meet the charge of Sup. Ct. R. 10.1(c)" because the opinion of the Nevada Supreme Court is consistent with the opinion of this Court in United States v. New Mexico, 455 U.S. 720 (1982). However, Scotsman limits its defense of the Nevada Supreme Court's decision to the state court's creation of a dual set of distinct analyses to be applied in sales tax and use tax cases, respectively, for determining whether a state may constitutionally tax a federal contractor's purchase of tangible personal property to be used in an

improvement to realty. See Scotsman's brief in opposition, pp. 2-3. As did the Nevada Supreme Court, Scotsman points to the following passage in New Mexico as authority from this Court approving a disparate analysis in a sales tax case than that to be used in a use tax case:

> Unless the entity as a whole is one of the Government's "constituent parts," then, a tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale - in both the real and a symbolic sense - a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure. Such was the court's conclusion in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954). . . .

New Mexico, 455 U.S. at 741-742.

The state disagrees with Scotsman's and the Nevada Supreme Court's interpretation of this passage. What this Court was saying here was that in a case involving an attempt to tax the sale of tangible personal property to a federal contractor, the transaction may be constitutionally immune from state sales tax if, for purposes of the transaction, the federal contractor is serving as a federal procurement agent and is so closely associated with the government, and so lacks an independent role in the purchase, as to make the sale a sale directly to the United States, i.e. the contractor is a constituent part of the government for purposes of the purchase of the tangible personal property.

The citation to Kern-Limerick is significant solely as an example of a case in which the federal contractor was

simply acting as a constituent part of the federal government for purposes of purchasing two tractors, and in New Mexico this Court so restricted its significance. New Mexico, 455 U.S. at 743. Neither the Nevada Supreme Court nor Scotsman make any attempt to explain how, under its contract with REECO, Scotsman was making a sale directly to the Department of Energy, other than referring to the clause passing title to the modular buildings directly to the federal government, and to note that REECO paid Scotsman using federal funds.[1] In New Mexico, this Court

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[1]In an enigmatic footnote, Scotsman cites United States v. Nevada Tax Commission, 291 F. Supp. 530 (D.Nev. 1968), aff'd, 439 F.2d 435 (9th cir. 1971), as if that case had a continuing vitality for purposes of state or federal constitutional law. This case is no longer good law. Nevada Tax Commission predates New Mexico by 14 years, as well as changes in Nevada sales and use tax statutes. See Decision of state district court judge, Appendix B to petition, p. A22; see also NRS 374.345 reprinted in

concluded that neither of these factors clothed the contractor or the vendor with federal constitutional immunity from state sales taxation, particularly where the contractor has a substantial independent role in making the purchase Id. at 744. It cannot be gainsaid that REECO, the general contractor on the construction project for which the modular buildings were purchased, had a substantial independent role in purchasing these buildings from Scotsman.

In the absence of any other factual

Appendix D to petition. Finally, the facts in Nevada Tax Commission are virtually identical to those in New Mexico, and involve the same governmental entity. The district court ruled that because title to the materials purchased by REECO passed immediately to the federal government, and were paid for by federal funds advanced by the government, the sale of materials was a sale to the federal government exempt from sales tax. Nevada Tax Commission, 291 F. Supp. at 532-533. It seems likely that a different result would be reached today, after New Mexico.

similarities this case may have with Kern-Limerick, it is apparent that he Nevada Supreme Court's analysis of the law leading to its conclusion that Scotsman's sale of modular buildings to REECO was a sale to the federal government which the state could not constitutionally tax is in conflict with this Court's opinion in New Mexico, and must be reversed.

B. THE STATE IS NOT SEEKING JUDICIAL REVIEW OF CONTESTED ISSUES OF FACT.

In its final argument in opposition to the petition, Scotsman claims the state's petition improperly seeks this Court's review of the factual findings of the Nevada Supreme Court. This argument is erroneous[2]. As noted in the

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[2]Both cases cited by Scotsman in support of this argument, Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U.S. 613 (1898) and Christman v. Miller, 197 U.S. 313 (1905) are inapposite, since in both cases the petitioner sought to

petition, the material facts in this case - namely, the contract between REECO and Scotsman - are not in dispute. What is in dispute is the legal effect of the contract in relation to the legal issue of whether the state may constitutionally impose its sales tax on Scotsman's sale of modular buildings to REECO.

Both the state district court and the Nevada Supreme Court concluded that summary judgment on these facts was appropriate, albeit reaching opposite conclusions on which party should prevail. The district court, relying on New Mexico, construed the contract as a sale by Scotsman to REECO of tangible personal property which was subject to state sales tax. The Nevada Supreme Court, relying on Kern-Limerick, construed the contract as a sale by

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challenge the trial court's findings of contested facts.

Scotsman directly to the federal government and so exempt from sales tax.

In its petition, the state cited to parts of the contract ignored by the Nevada Supreme Court in support of its argument that the conclusion reached by the state district court was correct as a matter of law. It is well settled that issues of contractual construction, in the absence of ambiguities or other actual complexities, present questions of law. Ellison v. California State Auto Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). The state is asking this Court to do no more than it did in New Mexico, construe the contract between REECO and Scotsman as a sale of tangible personal property on which the state may constitutionally impose and collect its sales tax.

CONCLUSION

Scotsman's arguments in opposition

to the state's petition for writ of certiorari fail to support the opinion of the Nevada Supreme Court as being consistent with the opinions of this Court in either New Mexico or Kern-Limerick. The reasons for Scotsman's failure is apparent. The Nevada Supreme Court's opinion is simply inconsistent with the law on the limits of federal immunity from state taxation as set forth so clearly in New Mexico.

To leave the Nevada Supreme Court's opinion intact will cause serious difficulties for the state in its ability to collect sales tax from vendors selling tangible personal property to federal contractors, and injects confusion and uncertainty again into this area of the law. This Court should grant the

. . .

. . .

. . .

petition for writ of certiorari, and reverse the Nevada Supreme Court.

FRANKIE SUE DEL PAPA
Attorney General
of the State of
Nevada

By: _____
*John S. Bartlett
Deputy Attorney
General
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